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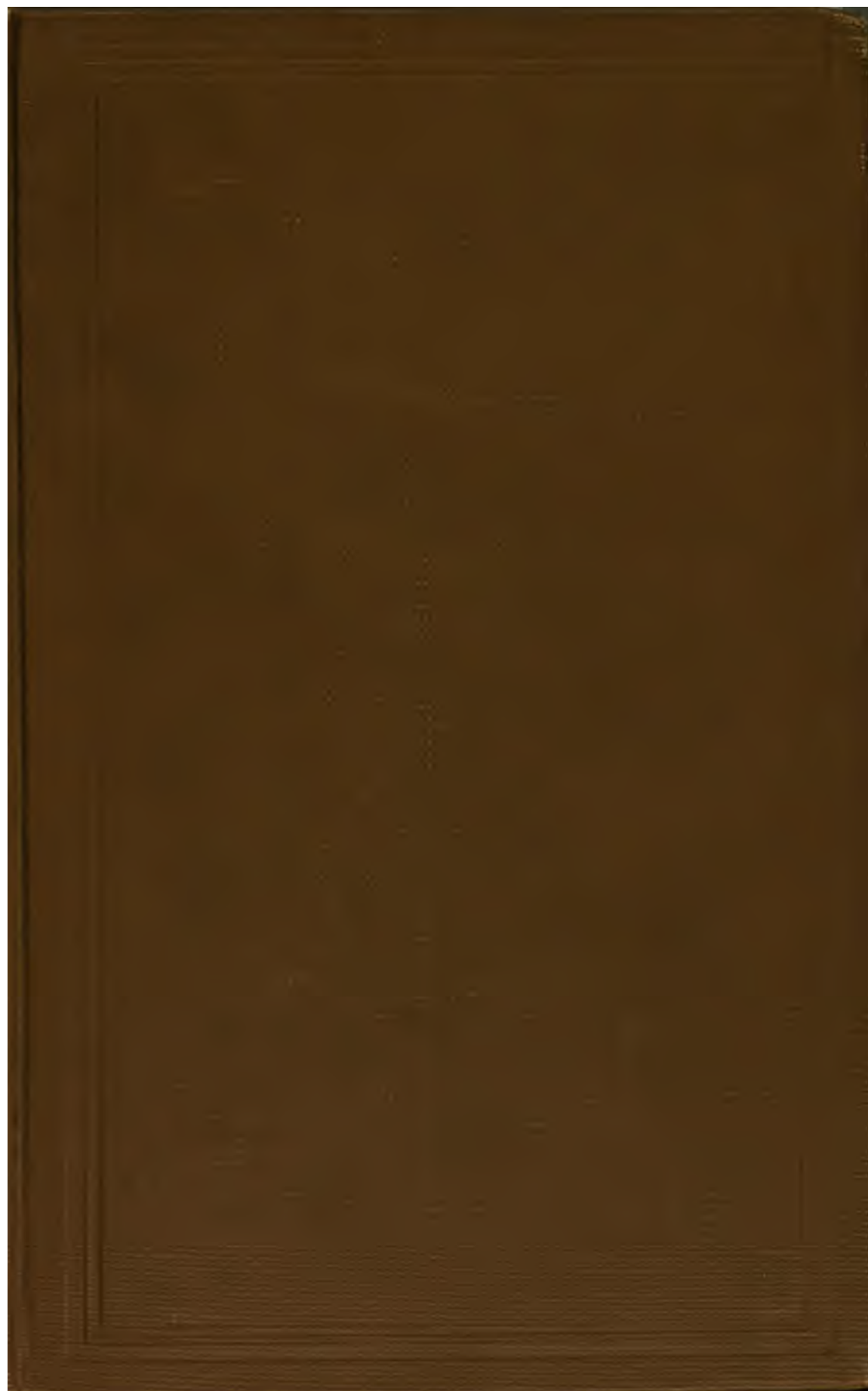
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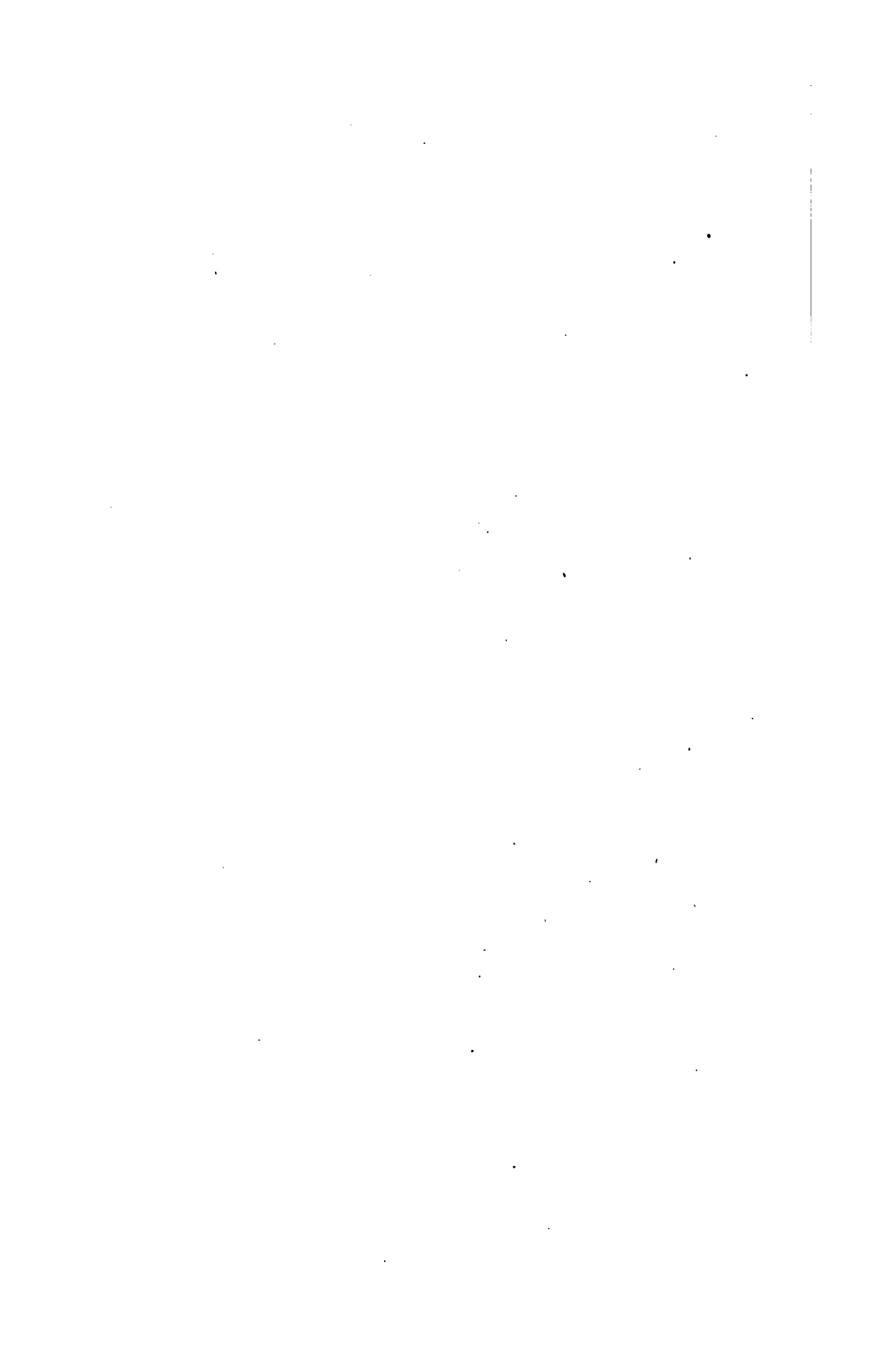
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copy 2

HANDBOOK  
ON THE  
LAW OF PARTNERSHIP  
INCLUDING  
LIMITED PARTNERSHIPS

BY EUGENE ALLEN GILMORE  
PROFESSOR OF LAW  
IN THE UNIVERSITY OF WISCONSIN

ST. PAUL, MINN.  
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1911

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## PREFACE

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THE original arrangement with the publishers contemplated, not an entirely new treatise on the law of Partnership, but merely a new edition of Mr. William George's text on this subject. After the work was begun, however, it seemed advisable to abandon Mr. George's text for the most part, and to prepare a substantially new treatise, using such portions of his work as should be found suitable. With the exception, therefore, of Chapters VIII and IX, the present book, both in arrangement and text, is new. A few passages and a number of citations and notes have been taken from Mr. George. Chapters VIII and IX are reproduced substantially as found in Mr. George's book, with the addition of later cases. The law on the subject being reasonably well worked out in the authorities, the aim of the present author has been to make a clear and definite statement of the leading principles, in a form serviceable alike to students and practitioners. Whatever merit the book has lies in this direction, rather than in the discussion of controverted points, or the advancement of new theories. The citations, while including all the leading cases, are not exhaustive, but are sufficiently full for practical purposes. The author acknowledges his great indebtedness for valuable assistance in the task to Mr. Henry A. Hirshberg and to Mr. Oliver S. Rundell; also to Mr. Olcott O. Partridge for his preparation of the chapter on Limited Partnerships.

E. A. G.

MADISON, Wisconsin, May, 1911.



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## This volume contains Key-Number Annotations

That is, to say, for every point of law which is stated or discussed in the text, and in support of which cases are cited, there is added to the author's note a citation to the Key-Number section or sections in the Decennial Digest or in the Key-Number Series, under which all cases directly involving that point have been digested. A similar citation to the Century Digest is given, except where the principle involved is one on which no case law existed prior to 1897.

# HANDBOOK

## ON THE

# LAW OF PARTNERSHIP

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### CHAPTER I

#### WHAT CONSTITUTES A PARTNERSHIP

1. Partnership Inter Se—True Partnership.
2. Partnership the Result of Intention.
3. Legal Intention Controls.
- 4-6. Partnership by Operation of Law—Partnership as to Third Parties.
7. Doctrine of Partnership as to Third Parties Overthrown.
8. Tests of Intention—In General.
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18. Liability of Stockholders in Defective Corporations.
19. Existence of Partnership—Nature of Question.
20. Burden of Proof.
21. Partnership by Estoppel.

#### PARTNERSHIP INTER SE—TRUE PARTNERSHIP

1. Partnership is a relation existing, by virtue of a contract, express or implied, between persons carrying on a business owned in common, with a view of profit to be shared by them.

A complete and exhaustive definition of the term "partnership," in the present uncodified state of the law, is impracticable. Numerous attempts have been made to formulate a satisfactory statement of the essential elements constituting a partnership, but "the various definitions have been approximate rather than exhaustive."<sup>1</sup> This is due in part to the difficulty inherent in any attempt at exhaustive definition. It is also due in part to the fact that "the law of partnership rests on a foundation composed of three materials: The common law; the law merchant; and the Roman law"<sup>2</sup>—and from these sources come fundamentally different conceptions of partnership. It is further due to the fact that the term is used to describe a situation of fact composed of several elements. In other words, the existence of a partnership is determined by the concurrence of several independent facts resulting from an agreement between the parties, such as, for example, the ownership of property in common, the joint ownership of capital, sharing of profits and losses arising from the use of common property or the prosecution of joint ventures, and the joint conduct of a business owned in common. The existence or nonexistence of certain of these elements constitutes tests by which the existence or nonexistence of a partnership is determined. Some of the difficulty in defining a partnership lies in the confusion that has existed in the courts as to which elements were necessary to constitute a partnership, varying tests having been applied from time to time.<sup>3</sup>

<sup>1</sup> MEEHAN v. VALENTINE, 145 U. S. 611, 12 Sup. Ct. 972, 36 L. Ed. 835, Gilmore, Cas. Partnership, 45. See "Partnership," *Dec. Dig. (Key No.)* §§ 1-13; *Cent. Dig.* §§ 13-29½.

<sup>2</sup> Collyer on Partnership, 1.

<sup>3</sup> Below is given a collection of definitions. A number are statutory, and others are collected from standard texts.

"Partnership is the relation subsisting between persons carrying on a business in common with a view to profit." Eng. Partn. Act, 1890 (53 & 54 Vict. c. 39).

"The association of two or more persons, for the purpose of carrying on business together, and dividing its profits between them." Civ. Code Cal. 1906, § 2395; Civ. Code Mont. 1907, § 5466; Civ. Code N. D. 1905, § 5818; Civ. Code S. D. 1908, § 1723.

"A joint interest in the partnership property, or a joint interest in

*Partnership is a Relation Existing for Profit*

The older definitions commonly speak of partnership as a contract. This is not quite accurate. Partnership is a relation existing between persons. It is true that that relation arises out of a contract; that a partnership does not arise except by agreement; but the term is used to

the profits and losses of the business, constitutes a partnership as to third persons. A common interest in profits alone does not." Civ. Code Ga. § 2629.

"Partnership is a synallagmatic and cummutative contract made between two or more persons for the mutual participation in the profits which may accrue from property, credit, skill or industry, furnished in determined proportions by the parties." Civ. Code La. art. 2801.

"As between the members thereof, the association, not incorporated, or two or more persons who have agreed to combine their labor, property and skill, or some of them, for the purpose of engaging in any lawful trade or business, and sharing the profits and losses as such between them." Partnership Law (Laws N. Y. 1897) c. 420, § 2.

"Partnership is the relation which subsists between persons who have agreed to combine their property, labor and skill in some business and to share the profits thereof between them." Indian Contract Act, § 239.

"A partnership is the contract relation subsisting between persons who have combined their property, labor or skill in an enterprise or business as principals for the purpose of joint profit." Bates, Partnership, § 1.

"A partnership is a voluntary unincorporated association of individuals, standing to one another in the relation of principals, for carrying out a joint operation or undertaking for the purpose of a joint profit." Dixon's Law of Partnership, 1.

"Partnership is a contract of two or more competent persons to place their money, effects, labor and skill, or some or all of them, in lawful commerce or business, and to divide the profit and bear the loss in certain proportions." T. Parsons, Partnership, c. 2, § 1.

"Partnership is the relation which subsists between persons who have agreed to share the profits of a business carried on by all or any of them on behalf of all of them." Pollock's Digest of the Law of Partnership (3d Ed.) § 4.

"Partnership is a contract of two or more competent persons to place their money, effects, labor and skill, or some or all of them, in lawful commerce or business, and to divide the profit and bear the loss in certain proportions." 3 Kent's Commentaries, 23.

"Partnership is a voluntary contract between two or more persons, joining together their money, goods, labor and skill, or either or all of them, upon an agreement that the gain or loss shall be divided

describe the relation that results, and not the contract from which it arises. The contract may be express or implied. If not expressed, its terms are determined from all the acts of the parties.<sup>4</sup>

The basis of a partnership is a business enterprise; without it there can be no partnership. As a legal institution the partnership was introduced into the common law from the law merchant, and had its source in the Roman law. As an aid in facilitating business enterprises it was well known among the merchants of the Middle Ages. Few cases involving partnership are to be found in the common-law reports until the seventeenth century, because they were tried in the mercantile courts. Yet though originated by the mercantile class, and usually composed of merchants, it is not necessary that the business be a mercantile one.<sup>5</sup> It is only necessary that there be a legal business of some kind conducted in common with a view to profit. It is not necessary that the persons composing a partnership firm be natural persons. The conventional person represented by a partnership may become a member of another partnership.<sup>6</sup> An artificial

proportionably between them, and having for its object the advancement and protection of fair and open trade." Watson, *Partnership*, p. 1.

"See Lindley, *Partnership*, p. 3, for a more extended collection of definitions."

<sup>4</sup> See chapter II, post, p. 69, on the Formation and Classification of Partnerships; *Briggs v. Kohl*, 132 Ill. App. 484; *Coons v. Coons*, 106 Va. 572, 56 S. E. 576; *Williamson & Co. v. Nigh*, 58 W. Va. 629, 53 S. E. 124. See "*Partnership*," *Dec. Dig. (Key No.)* §§ 1, 22; *Cent. Dig.* §§ 1, 7, 8.

<sup>5</sup> *Bates v. Babcock*, 95 Cal. 479, 30 Pac. 605, 16 L. R. A. 745, 20 Am. St. Rep. 133; *Southworth v. People*, 85 Ill. App. 239 (appealed 183 Ill. 621, 56 N. E. 407); *CHESTER v. DICKERSON*, 54 N. Y. 1, 13 Am. Rep. 550, *Gilmore, Cas. Partnership*, 136; *Flower v. Barnekoff*, 20 Or. 137, 25 Pac. 370, 11 L. R. A. 149. See "*Partnership*," *Dec. Dig. (Key No.)* § 15; *Cent. Dig.* § 2.

<sup>6</sup> *In re Hamilton* (D. C.) 1 Fed. 800; *Bullock v. Hubbard*, 23 Cal. 495, 83 Am. Dec. 130; *Meyer v. Krohn*, 114 Ill. 574, 2 N. E. 495; *Meador v. Hughes*, 14 Bush (Ky.) 652; *Simonton v. McLain*, 37 La. Ann. 663; *RAYMOND v. PUTNAM*, 44 N. H. 160, *Gilmore, Cas. Partnership*, 490. See "*Partnership*," *Dec. Dig. (Key No.)* §§ 16, 23; *Cent. Dig.* § 9.

person, such as a corporation, may also become a member of a partnership. Though it is usually held that the power to enter a partnership is not within the implied powers of a corporation, there is nothing in the nature of a corporation to prevent it. Consequently, it may do so where the power is expressly given or necessarily implied.<sup>†</sup>

*Profits to be Shared*

The profits of every business belong to the proprietors of the business. The profits of a partnership business belong to the partners, who are proprietors of that business. The securing of an interest in the profits of the business is the inducement which causes each partner to enter the partnership. Ordinarily the profits are by agreement to be shared between the partners in certain proportions, and all attempted common-law definitions state, as an essential element of a partnership, that the profits are to be shared. The English Partnership Act, however, does not in its definition of partnership mention a sharing of profits, but defines partnership as a common business carried on "with a view of profit."<sup>\*</sup> This has led to some questioning as to whether or not a sharing of profits is a necessary object of a partnership. It has been suggested that "this object appears to be rather an accident than of the essence of the partnership relation."<sup>\*</sup> It is doubt-

<sup>†</sup> *Butler v. American Toy Co.*, 46 Conn. 136; *Geurinck v. Alcott*, 66 Ohio St. 94, 63 N. E. 714. See "*Corporations*," *Dec. Dig. (Key No.)* § 379; *Cent. Dig.* § 1538.

<sup>\*</sup> English Partnership Act (1890) § 1 (1).

<sup>\*</sup> "The terms 'partnership' and 'partner' are evidently derived from 'to part,' in the sense of to divide amongst or share, and doubtless the division of profits amongst the partners is an almost universal object of partnerships. But this object appears to be rather an accident than of the essence of the partnership relation. It is apprehended that even before the act of 1890 there could have been no doubt that persons who carried on a business in all other respects as partners, but with the object of applying the profits towards some charitable purpose, instead of dividing them amongst themselves, would have been partners. If this be so, the omission of any words suggesting a division of profits from the definition of partnership is in accordance with the previous law." *Lindley's Law of Partnership* (7th Ed.) pp. 10, 11.

ful if sharing of profits can be considered as merely an accident of the partnership relation. It seems impossible to conceive of a proprietorship in a business which does not include a proprietorship in the profits of the business. Hence it is conceived that one with no interest in the profits of a business cannot be a partner in the business itself. It may be true that the profits are never in fact divided. The profits become the joint property of the partners, and there is, of course, no reason why they may not dispose of them jointly, without making any actual division. But it is believed that, if one conducts a business the profits of which do not belong to him, he cannot be considered as a proprietor of the business, nor held to a principal's liability with respect thereto. So in partnership a joint proprietorship of the profits is indissolubly connected with a joint proprietorship in the partnership business.<sup>10</sup>

## PARTNERSHIP THE RESULT OF INTENTION

2. Partnership arises only by consent of the parties to the relationship, and never by operation of law. The existence of a partnership depends upon the intention of the parties to establish the relationship which the law terms "partnership."

Partnership arises by virtue of a contract. Each member of a partnership, by entering into the relationship, authorizes his copartners to act for him in the conduct of the business. He intrusts his interests to them, thereby indicating his confidence in them. It is therefore necessary that every one entering into a partnership should

<sup>10</sup> Pollock's Digest of the Law of Partnership (8th Ed.) pp. 7, 8.  
9. "The evidence must show that the persons taking the profits shared them as principals in a joint business, in which each has an express or implied authority to bind the others." *Harvey v. Childs*, 28 Ohio St. 319, 22 Am. Rep. 387; *Briere v. Taylor*, 126 Wis. 347, 105 N. W. 817. See "Partnership," *Dec. Dig. (Key No.)* §§ 4-13, 30, 70; *Cent. Dig.* §§ 15-28, 39-48, 114.

have the right to select his copartners. It being a relationship of trust and confidence no one can be forced into it against his will. Hence the existence of a partnership depends upon the intention of the parties. "A partnership *inter se* must result from the intention of the parties as expressed in the contract, and they cannot be made to assume toward each other a relation which they have expressly agreed not to assume."<sup>11</sup>

### SAME—LEGAL INTENTION CONTROLS

3. It is the legal or manifested, not the secret, intention of the parties that is to determine whether a partnership exists.

Here, as elsewhere in the law, intention means the manifested, not the secret, intention. This is to be ascertained from the words and conduct of the parties. If they have entered into a written agreement, their intention is ascertained by a construction of such writing. If the agreement is not in writing, the intention is to be found in an interpretation of their words and conduct. Even if the agreement was originally put in writing, the language and conduct of the parties may be put in evidence to show that it was subsequently varied.<sup>12</sup> It is the intention to establish the relationship which the law inquires into. If two or more agree to enter into a certain relationship, it becomes a question of law as to whether or not that relationship constitutes a partnership; if the agreement is clear, the mere fact that the parties did or did not think they were becoming partners is immaterial. They must intend their acts; the consequences of those acts are determined by law. In one sense, therefore, per-

<sup>11</sup> *London Assurance Co. v. Drennan*, 116 U. S. 461, 6 Sup. Ct. 442, 29 L. Ed. 688. See "*Partnership*," *Dec. Dig. (Key No.)* § 17; *Cent. Dig.* § 3.

<sup>12</sup> *England v. Curling*, 8 Beav. 129. See, also, *Lord Eldon in Jackson v. Sedgwick*, 1 Swanst. 460, 469. See "*Partnership*," *Dec. Dig. (Key No.)* §§ 17, 18, 20-22, 29; *Cent. Dig.* §§ 1, 3, 4, 6-8, 30-33, 38.

sons may be held liable as partners who never intended to form a partnership. "It is nevertheless possible for parties to intend no partnership and yet to form one. If they agree upon an arrangement which is a partnership in fact, it is of no importance that they call it something else, or that they even expressly declare that they are not to be partners. The law must declare what is the legal import of their agreements."<sup>13</sup>

The objection that persons charged as partners had never intended to be partners was thus answered in a leading case: "What they did not intend to do was to incur the liabilities of partners. If intending to take the profits and have the business carried on for their benefit was intending to be partners, they did intend to be partners. If intending to see that the money was applied for that purpose, and for no other, and to exercise an efficient control over it, so that they might have brought an action to restrain it from being otherwise applied, and so forth, was intending to be partners, then they did intend to be partners."<sup>14</sup> So, on the other hand, the mere fact that the parties themselves call their relation a partnership will not make it so. "Where the question of part-

<sup>13</sup> Cooley, J., in *BEECHER v. BUSH*, 45 Mich. 188, 7 N. W. 783, 40 Am. Rep. 465, Gilmore, Cas. Partnership, 49; *Breinig v. Sparrow*, 39 Ind. App. 455, 80 N. E. 37. See "*Partnership*," *Dec. Dig. (Key No.)* §§ 17, 18, 20-22, 29; *Cent. Dig.* §§ 1, 3, 4, 6-8, 30-33, 38.

<sup>14</sup> *POOLEY v. DRIVER*, 5 Ch. Div. 458.

"The real inquiry always is: Have the parties by their contract combined their property, labor, or skill in an enterprise or business, as principals, for the purpose of joint profit? If they have done so, they are partners in that enterprise or business, no matter how earnestly they may protest they are not, or how distant the formation of a partnership was from their minds. The terms of their contract given, the law steps in and declares what their relations are to the enterprise or business and to each other." *Spaulding v. Stubbings*, 86 Wis. 255, 56 N. W. 469, 39 Am. St. Rep. 888.

"Whether the parties knew that they were partners or not, they certainly intended and contracted to do all that in law is necessary to create a partnership. The relation of partnership may be established, although the parties may not expressly intend to create such relation." *Chapman v. Hughes*, 104 Cal. 304, 37 Pac. 1048.

"The intent of the parties must be ascertained from the legal ef-

nership is to be determined from a contract between the parties to it, the relation must be found from the terms and provisions of the contract, and even though parties intend to become partners, yet if they so frame the terms and provisions of their contract as to leave them without any community of interest in the business or profits, they are not partners either in fact or in law. \* \* \* The terms of the agreement, where there is one, fix the real status of the parties toward each other."<sup>18</sup> If, however, the agreement between the parties leaves the relationship between them doubtful, or, in case there is no express agreement, if the conduct of the parties is ambiguous, it is material to show whether or not the parties intended to form a partnership, for "every case must be solved in favor of their intent; otherwise we should 'carry the doctrine of constructive partnership so far as to render it a

fect of the instrument, and not the names employed by the parties." *Van Kuren v. Trenton Locomotive & Machine Mfg. Co.*, 13 N. J. Eq. 306.

"Their belief, or understanding, that during that time they were not partners, in the legal sense of the word, was a mistaken and immaterial view of the law." *Farnum v. Patch*, 60 N. H. 294, 49 Am. Rep. 313.

*Bestor v. Barker*, 106 Ala. 250, 17 South. 389; *Parker v. Canfield*, 37 Conn. 250, 9 Am. Rep. 317; *Pursley v. Ramsey*, 31 Ga. 403; *Fougner v. Chicago First Nat. Bank*, 141 Ill. 124, 30 N. E. 442; *Griffin v. Cooper*, 50 Ill. App. 257; *Halliday v. Bridewell*, 36 La. Ann. 238; *Gunnison v. Langley*, 3 Allen (Mass.) 337; *Cudahy Packing Co. v. Hibou*, 92 Miss. 234, 46 South. 73, 18 L. R. A. (N. S.) 975; *Sheridan v. Medara*, 10 N. J. Eq. 469, 64 Am. Dec. 464; *Magovern v. Robertson*, 116 N. Y. 61, 22 N. E. 398, 5 L. R. A. 589; *Righter v. Farrel*, 134 Pa. 482, 19 Atl. 687; *Bentley v. Brossard*, 33 Utah, 396, 94 Pac. 736; *Rosenfield v. Haight*, 53 Wis. 260, 10 N. W. 378, 40 Am. Rep. 770. See "*Partnership*," *Dec. Dig. (Key No.)* §§ 17, 18, 20-22, 29; *Cent. Dig.* §§ 1, 3, 4, 6-8, 30-33, 38.

<sup>18</sup> *Sallors v. Nixon-Jones Printing Co.*, 20 Ill. App. 509; *OLIVER v. GRAY*, 4 Ark. 425; *DWINEL v. STONE*, 30 Me. 384; *Rose v. Buscher*, 80 Md. 225, 30 Atl. 637; *RYDER v. WILCOX*, 103 Mass. 24; *McDonald v. Matney*, 82 Mo. 358; *Van Kuren v. Trenton Locomotive & Machine Mfg. Co.*, 13 N. J. Eq. 302; *BURNETT v. SNYDER*, 76 N. Y. 344, *Gilmore, Cas. Partnership*, 117. See "*Partnership*," *Dec. Dig. (Key No.)* §§ 17, 18, 20-22, 29; *Cent. Dig.* §§ 1, 3, 4, 6-8, 30-33, 38.

trap to the unwary.' Kent, C. J., in *Post v. Kimberly*, 9 Johns. (N. Y.) 470, 504." <sup>18</sup>

#### **PARTNERSHIP BY OPERATION OF LAW—PARTNERSHIP AS TO THIRD PARTIES**

4. While true partnership results only from the intention of the parties to form the relation, there once existed in England, and still exists to some extent in the United States, an anomalous relation called "partnership as to third persons," which arose by operation of law, and which was neither true partnership nor a liability based upon estoppel. The origin of this relation was defined as follows: Those who share the profits of a business are liable by operation of law as partners to third persons for the debts incurred in such business, irrespective of whether or not they are in reality partners as between themselves.
5. **REASON:** Every one who has a share in the profits of trade ought also to bear his share of the losses, for when he takes of the profits he takes a part of that fund upon which the creditor relies for his payment.
6. **EXCEPTIONS:**
  - (1) Those who share gross returns are not necessarily liable as partners by operation of law.
  - (2) A reference to profits as a measure of compensation for services rendered or for the use of property furnished does not create a partnership as to third persons.

<sup>18</sup> *BEECHER v. BUSH*, 45 Mich. 188, 194, 7 N. W. 783, 40 Am. Rep. 465, Gilmore, Cas. Partnership, 49.

"One may not make a contract of partnership, and, calling it an agency, have it treated as such by the courts; for, when the facts are known, the law fixes the legal consequences which flow from them. Neither may one secure the benefits of the relation of a partner, and, by contract, secure immunity from its obligations as against creditors. But when the contract is susceptible of the construction put

*The Origin of the Rule*

It has been seen that partnership is the result of a contract, and that the relationship exists only between those who have voluntarily consented to assume it. Partnership liability, therefore, will exist only where there is a true partnership. It is possible, however, that a partnership liability may come about by the application of the well-established doctrines of estoppel. It may be that two or more persons have represented themselves to a third person as partners, and have induced such person to rely on those representations. They will not be permitted as against him to deny that they are partners. They are really not partners; but they are estopped, by reason of their representations, to show the contrary, and are therefore held as if they were partners.

Notwithstanding the general principle that partnership results only from a contract whereby the parties indicate an intention to form the relation, there early became established in the law an anomalous relation known as "partnership as to third parties," which was neither true partnership nor founded upon estoppel. This anomaly resulted from making certain acts arbitrary tests of partnership, rather than tests of intention. It continued to exist for many years in England, when it was finally abandoned, as will be shown presently, and still exists to some extent in the United States. The basis of the anomaly thus created by operation of law was found in the fact of participating in the profits of a business. It was laid down that he who shared the profits should be liable to third persons as a partner. It might be that he had never agreed to be a partner. Moreover, it might be, when the third person dealt with the alleged partnership, he did not even think that a partnership existed. Yet if he later discovered that some one, even though a stranger to him, had an agreement to share the profits of the

upon it by the parties at the time it was made, such construction will be accepted by the courts as the true one." *Fairly v. Nash*, 70 Miss. 193, 12 South. 149. See "*Partnership*," *Dec. Dig. (Key No.)* §§ 17, 18, 20-22, 29; *Cent. Dig.* §§ 1, 3, 4, 6-8, 30-33, 33.

business conducted by the one or ones actually dealt with, the third person could hold him as a partner. Thus there existed the possibility of one being held as a partner who was not one in fact, and who had never represented himself as such.

The reason given for the rule was that every one who has a share in the profits of a trade ought also to bear his share of the losses; for when he takes of the profits he takes a part of that fund upon which the creditor relies for his payment. The origin and meaning of the rule can best be considered in connection with the cases which first announced and applied it.

In *Bloxham v. Pell*<sup>17</sup> one partner purchased the interest of the other and continued the business, giving the outgoing partner a bond for the amount of his share. The bond bore 5 per cent. interest, and the purchasing partner agreed to pay in addition £1,200 per year for six years in lieu of the profits of the trade. This arrangement, if regarded as a loan to the purchasing partner, would give the outgoing partner an illegal rate of interest, and would therefore amount to a usurious transaction, and subject the participants to a criminal liability. In an action on a debt contracted after dissolution, Lord Mansfield said that such an arrangement was a mere device to get more than the legal rate of interest, and arbitrarily held the defendant liable as a partner; for "if it was not a partnership it was a crime, and it shall not lie in the defendant Pell's [the retiring partner] mouth to say: 'It is usury and not a partnership.'" The proposition thus announced, that persons may be held as partners by operation of law, appears to have been the basis of the decision in the later case of *Grace v. Smith*,<sup>18</sup> where on facts similar to those in *Bloxham v. Pell*, De Grey, C. J., laid down the doctrine stated in black-faced type above. This, however, as originally stated in *Grace v. Smith*, was accompanied

<sup>17</sup> *BLOXHAM v. PELL*, 2 W. Bl. 908, 909. See "*Partnership*," *Dec. Dig. (Key No.)* § 30; *Cent. Dig.* §§ 39-48.

<sup>18</sup> *GRACE v. SMITH*, 2 W. Bl. 908, Gilmore, Cas. *Partnership*, 17. See "*Partnership*," *Dec. Dig. (Key No.)* §§ 30-32; *Cent. Dig.* §§ 34, 35, 39-48.

by an important qualification, viz.: That if the profits are looked to only as a fund of payment, then the taking from such profits will not create a partnership by operation of law. It is only where one participates in the profits as proprietor or co-owner that the court in *Grace v. Smith* meant to hold that a partnership arose by implication of law. This qualification was not observed in the subsequent cases.

In *Waugh v. Carver*,<sup>19</sup> the next case of importance, the broad proposition was laid down, without limitation, that persons participating in the profits of a business are as to third persons partners by operation of law. In this case certain ship agents, carrying on business at different ports, agreed to allow each other certain portions of the profits or commissions made by the other; but it was expressly agreed that neither of them should be prejudiced or affected by the losses of the other, or be answerable for the other's acts, but each should carry on his own business on his own credit, and be accountable for his own losses and acts. In an action brought by a third person against all the parties to this agreement for goods supplied to one of them, the court said: "It is plain upon the construction of the agreement, if it be construed only between the Carvers and Geisler, that they were not, nor ever meant to be, partners. They meant each house to carry on trade without risk of each other, and to be at their own loss. \* \* \* But the question is whether they have not, by parts of their agreement, constituted themselves partners in respect to other persons. The case, therefore, is reduced to the single point, whether the Carvers did not entitle themselves, and did not mean, to take a moiety of the profits of Geisler's house, generally and indefinitely as they should arise, at certain times agreed upon for the settlement of their accounts. That they have so done is clear upon the face of the agreement; and, upon the authority of *Grace v. Smith*, he who takes a moiety

<sup>19</sup> *WAUGH v. CARVER*, 2 H. Bl. 235, Gilmore, Cas. Partnership, 19. See "*Partnership*," *Dec. Dig. (Key No.)* § 30; *Cent. Dig.* §§ 39-48.

of all profits indefinitely shall, by operation of law, be made liable to losses, if losses arise, upon the principle that, by taking a part of the profits, he takes from the creditors a part of that fund which is the proper security to them for the payment of their debts."

Abundant criticism of the broad rule thus laid down may be found in the works of text-writers and commentators and in judicial opinions. The fallaciousness of the rule lies in the violence it does to the real facts; for as a matter of fact creditors do not look to the profits of a business as security for their debts. The existence of debts is entirely inconsistent with the existence of profits. There are no profits so long as unpaid debts exist; hence it is entirely inaccurate to say that creditors rely on profits as a source of payment. It may be that they desire the business to be a profitable one in order that their security may be more ample; but when their debts are paid it is a matter of indifference to them as to how the profits are distributed.

*Exception—Sharing Gross Returns*

It was very soon apparent that, in the application of the doctrine of *Grace v. Smith* and *Waugh v. Carver*, a distinction was to be made between sharing in the profits and in the gross returns of a business or property. By "profits" is meant the amount by which the total income of a business exceeds the expenditures. There is, in strictness, no other kind of "profits." The term "gross profits" has, however, been used to designate the gross returns of a business. This has brought about the use of the term "net profits," to indicate what is really profits. Hence the two terms, "gross profits," to indicate gross returns, and "net profits," to indicate profits. The use of the terms "gross returns" and "profits" is preferable.

The reason given for holding one who shared profits to be a partner as to third persons was inapplicable, because creditors do not rely on profits for payment. There is no doubt, however, that creditors do rely on the gross returns of a business for payment. A clerk who works for a fixed salary is paid out of the gross returns of the busi-

ness. Consequently he takes part of that upon which the creditors rely for payment. Yet it has never been suggested that he incurs a partnership liability. Every one recognizes that he is but a general creditor, as others are; that the failure or success of the firm is no more material to him than to other creditors. He has the interest of a third person, not that of a proprietor. Suppose, however, his payment is a share of the gross returns. Even then the amount he receives does not indicate whether or not the business is successful. His interest is distinct from that of the proprietor, and may even be in conflict with it. "Though the sum may come out of profits, if they are sufficient, it will, nevertheless, come out of somebody, though there be no profits. The fixed amount, which is independent of the success or failure of the business, betrays a stranger's interest, and not a principal's. A proprietor's share springs out of the business, and varies according to its vicissitudes. A principal who made no contribution himself could never take his copartner's, and make gain out of his copartner's loss and the failure of the business."<sup>20</sup> Hence, despite the applicability of the reason which was given for holding those who shared profits to a partnership liability, it was soon decided that an agreement to share "gross profits" or "gross returns" did not make the parties partners even as to third persons. Thus a sailor shipping on a whaling voyage under an agreement to receive a share of the oil for his services is not a partner with the captain.<sup>21</sup> A captain of a ship, who receives one-fifth of the returns of the voyage, is not a partner with the owners.<sup>22</sup> No partnership exists between the owner of a barge and a man who works it and receives for his services one-half the gross earnings.<sup>23</sup> The proprietor of a theater, who lets it to a man-

<sup>20</sup> J. Parsons, *Principles of Partnership*, § 62.

<sup>21</sup> *WILKINSON v. FRASIER*, 4 Esp. 182. See "*Partnership*," *Dec. Dig. (Key No.)* § 30; *Cent. Dig.* §§ 39-48.

<sup>22</sup> *Mair v. Glennie*, 4 M. & S. 240. See "*Partnership*," *Dec. Dig. (Key No.)* § 30; *Cent. Dig.* §§ 39-48.

<sup>23</sup> *DRY v. BOSWELL*, 1 Camp. 330. See "*Partnership*," *Dec. Dig. (Key No.)* § 30; *Cent. Dig.* § 45.

ager, who finds the acting company, the proprietor providing the general service and expenses of the theater, and the gross receipts being equally divided, is not a partner with such manager.<sup>24</sup> Brokers who have agreed to divide commissions are not partners.<sup>25</sup> Co-owners of a chattel, who agree to divide its gross earnings, are not partners.<sup>26</sup> A landowner and one who cultivates the land for a share of the crops are not partners.<sup>27</sup> Connecting carriers are not partners, though a through rate is charged, where each bears the expense of its own line, and the gross receipts are shared in an agreed proportion.<sup>28</sup> And the owner of a hotel, who leases it, receiving as rent a share of the gross receipts, is not a partner of the lessee.<sup>29</sup>

*Same—Not Sharing Profits as Profits*

In the application of the rule of *Waugh v. Carver* another distinction is well recognized, viz.: Between a sharing of profits as profits, by virtue of a proprietary interest therein, and a reference to profits as a measure of compen-

<sup>24</sup> *Lyon v. Knowles*, 3 Best & S. 556; *Thomas v. Springer*, 134 App. Div. 640, 119 N. Y. Supp. 460. See "*Partnership*," *Dec. Dig. (Key No.)* § 30; *Cent. Dig.* § 45.

<sup>25</sup> *Wass v. Atwater*, 33 Minn. 83, 22 N. W. 8; *Pomeroy v. Sigerson*, 22 Mo. 177. See "*Partnership*," *Dec. Dig. (Key No.)* § 30; *Cent. Dig.* §§ 3, 39-48.

<sup>26</sup> *FRENCH v. STYRING*, 2 C. B. (N. S.) 357; *QUACKENBUSH v. SAWYER*, 54 Cal. 439, *Gilmore, Cas. Partnership*, 66. See "*Partnership*," *Dec. Dig. (Key No.)* §§ 10, 30; *Cent. Dig.* §§ 15, 25, 45.

<sup>27</sup> *DONNELL v. HARSHE*, 67 Mo. 170, *Gilmore, Cas. Partnership*, 63; *BLUE v. LEATHERS*, 15 Ill. 31; *Randall v. Ditch*, 123 Iowa, 582, 99 N. W. 190. See "*Partnership*," *Dec. Dig. (Key No.)* §§ 8, 30; *Cent. Dig.* §§ 21, 42.

<sup>28</sup> *Peterson v. Chicago, R. I. & P. Ry. Co.*, 80 Iowa, 92, 45 N. W. 573. Where, however, connecting carriers have associated themselves under a contract for a division of the profits of the carriage in certain proportions, or the receipts from it after deducting any expenses of the business, they may be held liable as partners. *Bostwick v. Champion*, 11 Wend. (N. Y.) 571; *Hutchinson on Carriers* (3d Ed.) § 250. See "*Partnership*," *Dec. Dig. (Key No.)* § 31; *Cent. Dig.* § 35.

<sup>29</sup> *BEECHER v. BUSH*, 45 Mich. 188, 7 N. W. 785, 40 Am. Rep. 465, *Gilmore, Cas. Partnership*, 49; *Drilling v. Armstrong* (Ark.) 127 S. W. 725; *Nantasket Beach Steamboat Co. v. Shea*, 182 Mass. 147, 65 N. E. 57; *Austin v. Neil*, 62 N. J. Law, 462, 41 Atl. 834. See "*Partnership*," *Dec. Dig. (Key No.)* §§ 8, 30; *Cent. Dig.* §§ 21, 22, 42.

sation for services rendered or for the use of property furnished. This distinction appears to have arisen through an attempt to reconcile the cases of *Bloxham v. Pell* and *Grace v. Smith*, for, while Lord Mansfield decided in favor of the plaintiff in the former case, a verdict for the defendant in the latter case was not disturbed; it being inferred that in the exercise of their right to find the facts, the jury had found that the payments did not come out of the profits. Confronted by these two cases, Lord Eldon, in *Ex parte Hamper*,<sup>30</sup> said: "It is clearly settled, though I regret it, that, if a man stipulates that, as a reward of his labor, he shall have, not a specific interest in the business, but a given sum of money, even in proportion to a given quantum of the profits, that will not make him a partner; but, if he agrees for a part of the profits, as such, giving him a right to an account,"<sup>31</sup> though having no property in the capital, he is, as to third persons, a partner." This distinction may be illustrated by the case of *Leggett v. Hyde*.<sup>32</sup> The defendant loaned a certain sum of money to the firm of A. D. Putnam & Co. in consideration that the firm would employ defendant's son as a clerk, and pay to the defendant one-third of the profits of the business, which was to be settled half yearly. In holding the defendant liable as a partner the court said: "It was one-third of the profits that he was to have, and not a sum in general equal to that one-third; so that he was to take it as profits, and not as an amount due—not as a measure of compensation, but as a result of the capital and industry. \* \* \* He had that interest in the profits, as profits, because he could claim a share of them specifically,

<sup>30</sup> 17 Ves 403, 412. See "*Partnership*," *Dec. Dig. (Key No.)* §§ 4-13; *Cent. Dig.* §§ 15-28.

<sup>31</sup> A right to an accounting does not prove a partnership. Any one whose compensation depends upon the profit realized from a business has a right to an accounting. *Schultz v. Brackett Bridge Co.*, 35 Misc. Rep. 595, 72 N. Y. Supp. 160. See "*Partnership*," *Dec. Dig. (Key No.)* §§ 4-13; *Cent. Dig.* §§ 15-28.

<sup>32</sup> *LEGGETT v. HYDE*, 58 N. Y. 272, 17 Am. Rep. 244, *Gilmore, Cas. Partnership*, 22. See "*Partnership*," *Dec. Dig. (Key No.)* § 30; *Cent. Dig.* §§ 39-48.

as they should appear on each six months. \* \* \* It matters not that the defendants meant not to be partners at all, and were not partners *inter se*. They may be partners as to third persons. \* \* \* The test of partnership is a community of profit—a specific interest in the profits as profits—in contradistinction to a stipulated portion of the profits as a compensation for services.” As a result of this distinction certain exceptions have been well recognized in those jurisdictions which follow the earlier English rule.

An agent, servant, factor, broker, or employé, who, with no interest in the capital or business, is to be remunerated for his services by a compensation from the profits, or by a compensation measured by the profits, is not by this fact alone made liable as a partner. In *Loomis v. Marshall*,<sup>33</sup> the court deemed it contrary to public policy to declare to “enterprising citizens of our country, who possess industry and skill, but are without capital, that they can neither improve farms, nor manufacture goods, nor be employed as mechanics, for a compensation proportioned to the avails of the sales—the product of their labor and skill—without involving themselves and their employers in such responsibility as partners as would to a considerable extent deprive them of employment.” The establishment of such a narrow exception indicated that the courts felt that the test was economically sound; it has already been shown that the reasoning upon which it was founded was inaccurate. Those who shared profits generally were, however, held to a partnership liability in England until after the middle of the last century.<sup>34</sup>

<sup>33</sup> 12 Conn. 69, 85, 30 Am. Rep. 596. See “Partnership,” *Deco. Dig. (Key No.)* § 30; *Cent. Dig.* § 43.

<sup>34</sup> Sharing profits as compensation for services rendered does not constitute one a partner in the business in which the service was rendered. *Smythe's Estate v. Evans*, 209 Ill. 376, 70 N. E. 906; *McWilliams v. Elder*, 52 La. Ann. 995, 27 South. 352; *Smith v. Dunn*, 44 Misc. Rep. 288, 89 N. Y. Supp. 881; *Lance v. Butler*, 135 N. C. 419, 47 S. E. 488; *State v. Hunt*, 25 R. I. 75, 54 Atl. 937; *Altgelt v. Alamo Nat. Bank*, 98 Tex. 252, 83 S. W. 6; *Langley v. Sanborn*, 135 Wis. 178, 114 N. W. 787. The same rule applies where profits are received as compensation for property or capital furnished. JOHNSON BROS.

### SAME—DOCTRINE OF PARTNERSHIP AS TO THIRD PARTIES OVERTHROWN

7. The rule which made the sharing of profits a test of partnership rather than a test of intention to form a partnership was overthrown in England, and was never generally accepted in the United States. Partnership liability grows out of true partnership only. Sharing of profits is evidence merely of intention.

The rule that there could be a partnership as to third persons without there being at the same time a partnership inter sese, and the subsidiary rule that such a partnership could be proved by showing that profits were shared, were both overthrown by the case of *Cox v. Hickman*. Though it did not profess to overrule the case of *Waugh v. Carver*, it has been understood as having done so.<sup>35</sup> The case was as follows: B. and J. T. Smith

*v. CARTER & CO.*, 120 Iowa, 355, 94 N. W. 850, *Gilmore, Cas. Partnership*, 54; *Roberts v. C. W. Adams & Son Co.*, 110 S. W. 314, 33 Ky. Law Rep. 207; *Gille Hardware & Iron Co. v. McCleverty*, 89 Mo. App. 154; *Hazell v. Clark*, 89 Mo. App. 78. But see *Dilley v. Abright* 19 Tex. Civ. App. 487, 48 S. W. 548. See "*Partnership*," *Dec. Dig. (Key No.)* §§ 4-13, 30; *Cent. Dig.* §§ 15-28, 39-48.

<sup>35</sup> *COX v. HICKMAN*, 8 H. L. C. 268, *Gilmore, Cas. Partnership*, 31.

"The first point, therefore, to be determined in the present case, is what really was the effect of the decision of the House of Lords in *COX v. HICKMAN*, 8 H. L. C. 268 [*Gilmore, Cas. Partnership*, 31]. Prior to that decision, the dictum of De Grey, C. J., in *GRACE v. SMITH*, 2 W. Bl. 998 [*Gilmore, Cas. Partnership*, 17], 'that every man who has a share of the profits of a trade ought also to bear a share of the loss,' had been adopted as the ground of judgment in *WAUGH v. CARVER*, 2 H. Bl. 235 [*Gilmore, Cas. Partnership*, 19], where it was laid down 'that he who takes a moiety of all the profits indefinitely shall by operation of law be made liable to losses, if losses arise, upon the principle that by taking a part of the profits he takes from the creditors a part of that fund which is the proper security to them for the payment of their debts.' This decision had never been overruled. The reasoning on which it proceeds seems to have been generally acquiesced in at the time; and when, more re-

for some time previously to the year 1849 carried on a business at the Stanton Iron Works, in Derbyshire, as ironmasters and corn merchants. In that year, becoming embarrassed in circumstances, a meeting of their creditors took place, and later a deed was entered into by the Smiths, of the first part, certain creditors, as trustees, of the second part, and the general creditors, including those named as trustees, of the third part. By the terms of this deed the Smiths transferred their interest to the trustees, with power to them to carry on the business under the name of the Stanton Iron Company, and divide the net income, which was always to be considered the property of the Smiths, among the creditors, and when all the debts were paid they were to hold for the Smiths. Provision was made for meetings of the creditors, and at such meetings a majority in value of the creditors present was to have power to make rules governing the conduct of the business, or order its discontinuance. Cox and Wheatcroft were among the members named as trustees, but Cox never acted, and Wheatcroft resigned before the happening of the events immediately giving rise to the cause of action. This arose through the acceptance by the trustees per proc. of the Stanton Iron Company, pursuant to the power given them in the deed, of bills of exchange

cently, it was disputed, it was a common opinion (in which I for one participated) that the doctrine had become so inveterately part of the law of England that it would require legislation to reverse it. In *COX v. HICKMAN* \* \* \* I think that the ratio decidendi is that the proposition laid down in *WAUGH v. CARVER*, 2 H. Bl. 235 [Gilmore, Cas. Partnership, 19], viz., that a participation in the profits of a business does of itself, by operation of law, constitute a partnership, is not a correct statement of the law of England; but that the true question is, as stated by Lord Cranworth, whether the trade is carried on on behalf of the person sought to be charged as a partner, the participation in the profits being a most important element in determining that question, but not being in itself decisive; the test being, in the language of Lord Wensleydale, whether it is such a participation of profits as to constitute the relation of principal and agent between the person taking the profits and those actually carrying on the business." Blackburn, J., in *BULLEN v. SHARP*, L. R. 1 C. P., at 108, Gilmore, Cas. Partnership, 36. See "*Partnership*," *Dec. Dig. (Key No.)* § 30; *Cent. Dig.* §§ 39-48.

drawn by Hickman who had supplied goods to the Stanton Iron Company. Action was brought against the defendants as partners, upon one of the bills. The fact that they had been named or had acted as trustees was not dwelt upon, at least in the House of Lords; Blackburn, J., stating the question thus: "The question is, whether the stipulations are such as to render those creditors who are parties to the deed partners in the Stanton Iron Company, so far, at least, as regards liability to third persons." Judgment was given for the plaintiff in the Common Pleas,<sup>36</sup> and an appeal was taken to the Exchequer Chamber, where the judges were equally divided. The judgment therefore stood, and the defendants appealed to the House of Lords. The judges were summoned, the opinions of those who attended being equally divided; but the Lords were unanimous in holding that the defendants were not liable as partners. Lords Cranworth and Wensleydale delivered the principal opinions.<sup>37</sup> Lord Cranworth in the course of his opinion said that: "The liability of one partner for the acts of his copartner is in truth the liability of a principal for the acts of his agent. \* \* \* It was argued that, as they would be interested in the profits, therefore they would be partners. But this is a fallacy. It is often said that the test, or one of the

<sup>36</sup> 18 C. B. 617. Jervis, C. J., in delivering the opinion of the court, said: "The case, in fact, is expressly bound by the authority of *Owen v. Body*, 5 Ad. & E. 28, 6 N. & M. 448, which is recognized, and its principle clearly and neatly stated by Maule, J., in *Janes v. Whitbread*, ante, Vol. XI., p. 406, shortly before we had the misfortune to lose him." See "*Partnership*," *Dec. Dig. (Key No.)* § 30; *Cent. Dig.* §§ 39-48.

<sup>37</sup> "In the result, the House of Lords, consisting of Lord Campbell, C., and Lords Brougham, Cranworth, Wensleydale and Chelmsford, unanimously decided that the creditors were not partners. The judgments of Lord Cranworth and of Lord Wensleydale bear internal evidence of having been written. Lord Campbell, C., and Lords Brougham and Chelmsford said a few words expressing their concurrence. It is therefore in the written judgments, and more especially in the elaborate judgment of Lord Cranworth, that we must look for the ratio decidendi." Blackburn, J., in *BULLEN v. SHARP*, L. R. 1 C. P., at 109, Gilmore, Cas. Partnership, 36. See "*Partnership*," *Dec. Dig. (Key No.)* § 30; *Cent. Dig.* §§ 39-48.

tests, whether a person, not ostensibly a partner, is nevertheless, in contemplation of law, a partner, is whether he is entitled to participate in the profits. This, no doubt, is, in general, a sufficiently accurate test; for a right to participate in profits affords cogent, often conclusive, evidence that the trade in which the profits have been made was carried on in part for or on behalf of the person setting up the claim. But the real ground of liability is that the trade has been carried on by persons acting on his behalf. When that is the case, he is liable to the trade obligations, and entitled to its profits, or to a share of them. It is not strictly correct to say that his right to share in the profits makes him liable to the debts of the trade. The correct mode of stating the proposition is to say that the same thing which entitles him to the one makes him liable to the other, namely, the fact that the trade has been carried on on his behalf; i. e., that he stood in the relation of principal towards the persons acting ostensibly as the traders, by whom the liabilities have been incurred, and under whose management the profits have been made." Lord Wensleydale said: "A man who allows another to carry on trade, whether in his own name or not, to buy and sell, and to pay over all the profits to him, is undoubtedly the principal, and the person so employed is the agent, and the principal is liable for the agent's contracts in the course of his employment. So if two or more agree that they should carry on a trade, and share the profits of it, each is a principal, and each is an agent for the other, and each is bound by the other's contract in carrying on the trade, as much as a single principal would be by the act of an agent, who was to give the whole of the profits to his employer. Hence it becomes a test of the liability of one for the contract of another that he is to receive the whole or a part of the profits arising from that contract by virtue of the agreement made at the time of the employment. I believe this is the true principle of partnership liability. Perhaps the maxim that he who partakes the advantage ought to bear the loss, often stated in the earlier cases on this subject, is only the consequence, not the cause, why a man is

made liable as a partner."<sup>38</sup> This case clearly states that a sharing of profits is not sufficient to charge one with a partnership liability, in the absence of all other elements of partnership. Though some doubt was expressed in *Kilshaw v. Jukes* as to whether it should be extended beyond its particular facts, later cases demonstrated that it was to be taken as establishing a general rule.<sup>39</sup>

Since, except where the parties by their conduct had estopped themselves to deny the partnership relation, those cases where profits were shared constituted the only class of cases where there existed a partnership as to third persons, in the absence of a partnership *inter se*, it followed that, when sharing profits ceased to be a conclusive test of partnership liability, partnerships as to third persons ceased to exist.<sup>40</sup>

*Effect of Cox v. Hickman in America*

The case of *Cox v. Hickman* has been generally followed in the United States. In *Beecher v. Bush*,<sup>41</sup> Cooley, J., said that "it would be easy to show that the American

<sup>38</sup> *COX v. HICKMAN*, 8 H. L. C. 268, Gilmore, Cas. Partnership, 31. See "*Partnership*," *Dec. Dig. (Key No.)* § 30; *Cent. Dig.* §§ 39-48.

<sup>39</sup> *KILSHAW v. JUKES*, 3 Best & Smith, 847; *BULLEN v. SHARP*, L. R. 1 C. P. 86, Gilmore, Cas. Partnership, 36; *Holme v. Hammond*, L. R. 7 Ex. Cas. 218. See "*Partnership*," *Dec. Dig. (Key No.)* § 30; *Cent. Dig.* §§ 39-48.

<sup>40</sup> "They say that the defendant is a partner with his son, and that, if not partners *inter se*, they are so as regards third parties. A most remarkable expression! Partnership means a certain relation between two parties. How, then, can it be correct to say that A. and B. are not in partnership as between themselves, they have not held themselves out as being so, and yet a third person has a right to say they are so as relates to him? But that must mean *inter se*, for partnership is a relation *inter se*, and the word cannot be used except to signify that relation." Bramwell, B., in *BULLEN v. SHARP*, L. R. 1 C. P. 86, Gilmore, Cas. Partnership, 36. See "*Partnership*," *Dec. Dig. (Key No.)* § 30; *Cent. Dig.* §§ 39-48.

<sup>41</sup> *BEECHER v. BUSH*, 45 Mich. 188, 7 N. W. 785, 40 Am. Rep. 465, Gilmore, Cas. Partnership, 49. See *Eastman v. Clark*, 53 N. H. 276, 16 Am. Rep. 192, for an exhaustive examination of the cases on the subject of partnership as to third persons, by Doe, J. In speaking of the test of *WAUGH v. CARVER*, 2 H. Bl., 235, Gilmore, Cas. Partnership, 19, he says: "Neither is such a test established by a preponderance of the weight of American cases decided without ref-

authorities are, in the main, in harmony with it." In a few states, however, the courts have held themselves concluded by previous decisions following the rule of *Waugh v. Carver*. Hence they have refused to recognize the later case, declaring that to do so would involve a change in the law such as the Legislature alone was competent to effect.<sup>42</sup>

reference to *COX v. HICKMAN*, 8 H. L. Cas. 268, Gilmore, Cas. Partnership, 31. See "*Partnership*," Dec. Dig. (Key No.) § 30; Cent. Dig. §§ 39-48.

<sup>42</sup> "We are aware that the trend of modern outside authorities is against the old rule, \* \* \* and that now many courts hold that persons are not liable to third persons as partners, although they share in the profits of a business, unless they are really partners *inter sese*, or have held themselves out as partners under such circumstances as to estop them from denying that they were. For my own part, I wish the law in this state upon the subject of partnership had undergone the change which is pointed out, \* \* \* so that, even as to third persons, a partnership could not be held to exist, unless there was really a partnership *inter sese*, or else the person claimed to be a partner had, by holding himself out as such, estopped himself to deny that he was. This would greatly simplify matters in cases in which the question of partnership or no partnership may arise, and would, it seems to me, place the law in such cases upon a more rational and reasonable basis. But we are bound by the previous decisions of this court which we have cited, which are directly in point, and must follow them so long as they stand unreviewed and unreversed." *Brandon & Dreyer v. Conner*, 117 Ga. 759, 45 S. E. 371, 63 L. R. A. 260.

"It is claimed by the learned counsel for the appellant that the rule in *GRACE v. SMITH* [2 W. Bl. 998, Gilmore, Cas. Partnership, 17] and *WAUGH v. CARVER* [2 H. Bl. 235, Gilmore, Cas. Partnership, 19] has been exploded, and another rule propounded, which shields the appellant. He is correct so far as the courts in England are concerned." After commenting on *COX v. HICKMAN*, 8 H. L. Cas. 268, Gilmore, Cas. Partnership, 31, and *BULLEN v. SHARP*, L. R. 1 C. P. 86, Gilmore, Cas. Partnership, 36, the court proceeds: "Without discussing those decisions and determining just how far they reach, it is sufficient to say that they are not controlling here; that the rule remains in this state as it has long been, and that we should be governed by it until here, as in England, the Legislature shall see fit to abrogate it." Folger, J., in *LEGGETT v. HYDE*, 58 N. Y. 272, 17 Am. Rep. 244, Gilmore, Cas. Partnership, 22. See *HACKETT v. STANLEY*, 115 N. Y. 625, 22 N. E. 745, Gilmore, Cas. Partnership, 27.

"The agreement between the defendants made them partners at

### TESTS OF INTENTION—IN GENERAL

8. As partnership arises from the actual manifested intention to do those things which in law constitute the relation, it is necessary to examine the various constituent acts which tend to prove the essential intention, and to determine the evidential value of such acts.

The question to be ascertained in determining whether or not two or more persons are partners is: Did they intend to become co-proprietors of a common business, conducted for mutual profit? If they can be proved to have intended this, there is no further question; they are partners. The difficulty, however, lies in ascertaining the existence of an intention to do this. Parties frequently agree upon the elements of a partnership, leaving to be inferred whether by such agreement they intend to be partners. If they agree upon all of the elements, there can be no dif-

common law and in this state. The case of *WAUGH v. CARVER*, 2 H. Bl. 235 [Gilmore, Cas. Partnership, 19], decided in 1793, which followed *GRACE v. SMITH*, 2 W. Bl. 998 [Gilmore, Cas. Partnership, 17], decided in 1775, was followed and adopted to its full extent in *Purviance v. McClintee*, 6 Serg. & R. (Pa.) 259, in 1820. The well-settled rule of *WAUGH v. CARVER* was overruled in England in 1860 by the case of *COX v. HICKMAN*, 8 H. L. Cas. 268 [Gilmore, Cas. Partnership, 31], but there has been no departure from it in this state, except by legislation in 1870. In the opinion in *Edwards v. Tracy*, 62 Pa. 374, decided in 1869, Sharswood, J., pointed out the new English rule of *COX v. HICKMAN*, but followed the old one of *WAUGH v. CARVER*, saying: 'It is entirely too late now to question either the rule or the exception. We are bound to stand super antiquas vias by our own decided cases.' In the opinion in *Lord v. Proctor*, 7 Phila. (Pa.) 630, decided at nisi prius the same year, he said that the rule in *WAUGH v. CARVER* was too ancient a landmark in our law to be now disturbed, and that it had accordingly been followed in *Edwards v. Tracy*. Since the act of 1870 there has been no change in judicial decision." *Wessels v. Weiss*, 166 Pa. 490, 31 Atl. 247. See, also, the Texas cases: *Cothran v. Marmaduke*, 60 Tex. 370; *Dilley v. Abright*, 19 Tex. Civ. App. 487, 48 S. W. 548; *Fouke v. Brengle* (Tex. Civ. App.) 51 S. W. 519. See "*Partnership*," *Dec. Dig. (Key No.)* § 30; *Cent. Dig.* §§ 39-48.

ficulty in making such an inference. If they agree upon only one or more, however, it often becomes a question of extreme difficulty to determine their intention. No conclusive test can be given, each case depending in large measure upon its peculiar facts. Yet the agreement to do anything which ordinarily goes to make up a partnership is of value as being evidence of the intention of the parties. In this sense, therefore, they may be considered as tests of intention. While all the facts of each particular case are to be taken into consideration, it is obvious that some facts will have more evidential value than others.<sup>43</sup> In the main, the doctrine that participating in profits will of itself make the participants partners has been abandoned. It is now proposed to examine the various facts tending to establish the required intention, and to consider their value as evidence.

### SAME—MUTUAL AGENCY

9. Mutual agency is not a test of partnership. Agency is a result of partnership, but mutual agency does not create a partnership.

#### *Mutual Agency as a Test*

In *Cox v. Hickman* Lord Cranworth stated, as a test of liability as a partner, "the fact that the trade has been carried on on his behalf; i. e., that he stood in the relation of principal towards the persons acting ostensibly as the traders, by whom the liabilities have been incurred, and under whose management the profits have been made."<sup>44</sup> It has been recognized, however, that the relation of prin-

<sup>43</sup> "So far as the notion ever took hold of the judicial mind that the question of partnership or no partnership was to be settled by arbitrary tests it was erroneous and mischievous, and the proper corrective has been applied." Cooley, J., in *BEECHER v. BUSH*, 45 Mich. 188, 200, 7 N. W. 785, 789, 40 Am. Rep. 465, Gilmore, Cas. Partnership, 49. See "*Partnership*," *Dec. Dig. (Key No.)* §§ 4-13, 17, 30; *Cent. Dig.* §§ 3, 15-28, 39-48.

<sup>44</sup> *COX v. HICKMAN*, 8 H. L. O. 268, Gilmore, Cas. Partnership, 51. See "*Partnership*," *Dec. Dig. (Key No.)* § 14; *Cent. Dig.* § 13.

principal and agent does not furnish a conclusive test of partnership. "As has been pointed out in later English cases, the reference to agency as a test of partnership was unfortunate and inconclusive, inasmuch as agency results from partnership, rather than partnership from agency. \* \* \* Such a test seems to give a synonym, rather than a definition; another name for the conclusion, rather than a statement of the premises from which the conclusion is to be drawn. To say that a person is liable as a partner, who stands in the relation of principal to those by whom the business is actually carried on, adds nothing by way of precision, for the very idea of partnership includes the relation of principal and agent."<sup>45</sup> While the relationship of a principal undoubtedly serves as a test of "liability," it does not furnish a test of liability as a partner. The relationship of agent and principal results from the foundation of a partnership. "The acting partners are identified with the company, and have power to conduct its general business in the usual way. This power is conferred by entering into the partnership, and is perhaps never to be found in the articles."<sup>46</sup> Every partner is the general agent of the partnership in the conduct of the partnership business; hence one who seeks to charge the partnership with the acts of a partner need but prove the partnership. It is true that as between the partners the authority of one to act in the conduct of the business may be limited;<sup>47</sup> but this does not relieve the firm from liability for the acts of such partner as against one who knew of the existence of the part-

<sup>45</sup> Gray, J., in *MEEHAN v. VALENTINE*, 145 U. S. 611, 12 Sup. Ct. 972, 36 L. Ed. 835, Gilmore, Cas. Partnership, 45; *Boreing v. Wilson & Moss*, 108 S. W. 914, 33 Ky. Law Rep. 14. See "Partnership," *Dec. Dig. (Key No.)* §§ 1, 14; *Cent. Dig.* §§ 13, 17.

<sup>46</sup> Marshall, C. J., in *WINSHIP v. BANK of UNITED STATES*, 5 Pet. 529, 8 L. Ed. 216, Gilmore, Cas. Partnership, 356. See "Partnership," *Dec. Dig. (Key No.)* § 125; *Cent. Dig.* § 190.

<sup>47</sup> *BEECHER v. BUSH*, 45 Mich. 188, 7 N. W. 785, 40 Am. Rep. 465, Gilmore, Cas. Partnership, 49; *McAlpine v. Millen*, 104 Minn. 289, 116 N. W. 583; *First Nat. Bank v. Stadden*, 103 Minn. 403, 115 N. W. 198; *Taylor v. Sartorius*, 130 Mo. App. 23, 108 S. W. 1089. See "Partnership," *Dec. Dig. (Key No.)* § 14; *Cent. Dig.* § 13.

nership, but did not know of the limitation on the partner's authority.<sup>48</sup>

It may thus be seen that mutual agency results from partnership. The mere fact that it is but a result of partnership would not render it inapplicable as a test of the existence of a partnership, provided that it always did result from the existence of a partnership, and provided, further, that it did not exist independent of the existence of a partnership. As a matter of fact mutual agency does not always result from the existence of a partnership. In *Holme v. Hammond*, Cleasby, B., said: "I must add, however, that I cannot quite concur in the passage cited by my Brother Martin from the judgment of O'Brien, J., in *Shaw v. Galt*, 8 H. L. C. 268, to the effect that the existence of partnership is to be ascertained by seeing whether each is principal and agent to and for the others. My view is that agency is in such cases deduced from partnership, rather than partnership from agency. But neither does partnership always imply this mutual agency. In the common case of partnership, where, by the terms of the partnership, all the capital is supplied by A., and the business is to be carried on by B. and C. in their own names, it being a stipulation in the contract that A. shall not appear in the business or interfere in its management, that he shall neither buy nor sell, nor draw or accept bills, no one would say that, as among themselves, there was any agency of each one for the others."<sup>49</sup> Therefore mutual

<sup>48</sup> "Every partner is an agent of the firm and his other partners for the purpose of the business of the partnership; and the acts of every partner who does any act for carrying on in the usual way business of the kind carried on by the firm for which he is a member bind the firm and his partners, unless the partner so acting has in fact no authority to act for the firm in the particular matter, and the person with whom he is dealing either knows that he has no authority, or does not know or believe him to be a partner." Eng. Partnership Act of 1890, § 5.

"This section introduces no change in the law." *Lindley's Law of Partnership* (7th Ed.) p. 145.

See the opinions of James, L. J., in *Benid's Case*, 5 Ch. 733, and of Parke, B., in *Hawken v. Bourne*, 8 M. & W. 710. See "*Partnership*," *Dec. Dig. (Key No.)* §§ 132, 160; *Cent. Dig.* § 196.

<sup>49</sup> *Holme v. Hammond*, L. R. 7 Ex. Cas. 218. 233. See "*Partnership*," *Dec. Dig. (Key No.)* § 14; *Cent. Dig.* § 13.

agency as a test of partnership, even if it were accurate, is not sufficiently extensive to include all cases of partnership. It is not, however, even accurate, because it is possible to have cases of mutual agency without the existence of a partnership. For instance, joint owners of chattels may agree upon the use of the chattels, giving each certain powers over it, as co-owners of a horse may agree that each shall find a buyer for the horse, without thereby creating a partnership between them.<sup>50</sup> Or two persons may jointly own and jointly use a threshing machine in threshing for others, without thereby becoming liable as partners.<sup>51</sup>

### SAME—SHARING GROSS RETURNS

#### 10. An agreement to divide the gross returns of a business is not prima facie evidence of an intention to form a partnership.

The reason for the rule holding sharers of the profits of an enterprise to a partnership liability was stated to be that he who shares in the profits of a business should share in the losses, because he takes part of the fund upon which the creditor relies for payment.<sup>52</sup> It has been shown that this reason was inaccurately applied to sharing profits, for the creditor does not rely on profits as a fund of payment. But, if the reasoning were sound, it should have been applied to those who agreed to share the gross returns of a business; for he who shares the gross receipts of a business does take from the fund upon which the creditor ordinarily relies for reimbursement.<sup>53</sup>

<sup>50</sup> GOELL v. MORSE, 126 Mass. 480. See "Partnership," Dec. Dig. (Key No.) § 14; Cent. Dig. § 13.

<sup>51</sup> STATE BANK OF LUSHTON v. O. S. KELLEY CO., 47 Neb. 678, 66 N. W. 619; FRENCH v. STYRING, 2 O. B. (N. S.) 357. See "Partnership," Cent. Dig. § 75.

<sup>52</sup> GRACE v. SMITH, 2 Wm. Bl. 998, Gilmore, Cas. Partnership, 17. See "Partnership," Dec. Dig. (Key No.) §§ 4-13, 30; Cent. Dig. §§ 15-28, 38-48.

<sup>53</sup> "I may here observe, that if the ground upon which a participation in profits was considered as constituting a partnership be (as

It was early decided, however, that sharing gross returns did not make the parties liable as partners;<sup>54</sup> and, since an agreement to share gross returns did not create a partnership liability, it follows that it alone would not be sufficient to create a partnership. This principle has been enacted into the English Partnership Act, 1890.<sup>55</sup>

stated by Chief Justice De Grey in *GRACE v. SMITH*), that 'if any person takes part of the profits, he takes part of that fund on which the creditor of the trader relies for his payment,' it appears difficult to explain why a person should not be rendered liable as a partner by a participation in the gross profits or proceeds as well as by one in the net profits. The latter are only to be ascertained after deducting and providing for all liabilities; but the amount of a share in the gross proceeds would be ascertained, and might be taken away as soon as they were received, without providing for the liabilities." O'Brien, J., in *Shaw v. Galt*, 16 Ir. Com. Law, 357, 373.

"The question has been raised whether consistency to the supposed 'net profit rule' requires that a sharer of gross returns should be held to a similar liability. On the one hand, 'the letter of the net profit rule' has been looked at without regard to its reason. It is said, in substance, that gross returns, though they include net profits, are not literally the same thing; that a participant in gross returns does not participate in profits as profits; and that a division of gross returns is only incidentally a division of profits, not a division of profits as such. This reasoning is extremely unsatisfactory. On the other hand, it is said that the reason of the 'net profit rule' applies with much greater force to the sharer of gross returns. Gross returns necessarily include net profits. If the sharer in net profits takes from the creditors the fund upon which they rely for payment, much more does the sharer in gross returns. And, if taking from the fund is sufficient reason for holding the former liable, a fortiori it is a reason for holding the latter. Net profits are only to be ascertained after deducting and providing for all liabilities; but the amount of a share in the gross proceeds would be ascertained, and might be taken away as soon as they were received, without providing for the liabilities.' This train of reasoning appears to be unanswerable." Smith, J., in *Eastman v. Clark*, 53 N. H. 276, 16 Am. Rep. 192. See "*Partnership*," *Dec. Dig. (Key No.)* §§ 4-13, 30; *Cent. Dig.* §§ 15-23, 38-48.

<sup>54</sup> *Benjamin v. Porteus*, 2 H. Bl. 590; *DRY v. BOSWELL*, 1 Camp. 330; *Mair v. Glennie*, 4 M. & S. 240.

"A person who shares gross profits (gross returns) is not a partner, but a person who shares net profits is prima facie to be considered as a partner." Parke, B., in *Heyhoe v. Burge*, 9 C. B. 431. See "*Partnership*," *Dec. Dig. (Key No.)* §§ 10, 30; *Cent. Dig.* §§ 25, 45.

<sup>55</sup> "The sharing of gross returns does not of itself create a part-

Moreover, taken alone, it is not even *prima facie* evidence that parties are partners to prove that they have agreed to share the gross returns of a business. This is true even though, in addition to the agreement, they are co-owners of a chattel from or through which they expect to gain the returns to be divided.<sup>56</sup>

### SAME—SHARING PROFITS

#### 11. An agreement to share the profits of a business is *prima facie* evidence of an intention to form a partnership.

The case of *Cox v. Hickman*, as finally understood, effectually dispelled the notion that participation in profits made a partnership by operation of law as to third persons. Yet it is one of the results of a partnership that the profits shall be divided. That is in general the purpose of the establishment of a partnership. Therefore proof of sharing of profits, or of an agreement to share profits, is cogent evidence that the parties intended to form a partnership. It is evidence so strong that, if nothing to the contrary is shown, it is conclusive.<sup>57</sup> In other words, shar-

nership, whether the persons sharing such returns have or have not a joint or common right or interest in any property from which or from the use of which the returns are derived." Partnership Act, 1890, § 2 (2).

<sup>56</sup> Partnership Act, 1890, § 2, par. (2). This section merely codifies the law as it already existed. *Gibson v. Lupton*, 9 Bing. 297; *FRENCH v. STYRING*, 2 C. B. N. S. 357; *Moore v. Curry*, 106 Mass. 409; *Tyson v. Bryan*, 84 Neb. 202, 120 N. W. 940. See "*Partnership*," *Dec. Dig. (Key No.)* §§ 10, 30; *Cent. Dig.* §§ 25, 45.

<sup>57</sup> "A right to participate in profits affords cogent, often conclusive, evidence that the trade in which the profits have been made was carried on in part for or on behalf of the person setting up such a claim." Lord Cranworth in *COX v. HICKMAN*, 8 H. L. C. 268, *Gilmore, Cas. Partnership*, 31.

"But it is said that there are dicta of various judges in various cases that the participation in the profits may decide the question, or that it is *prima facie* evidence of a partnership. Undoubtedly, if one found that two persons were participating in the profits made by a business, and knew nothing more, one would say, How is this?

ing profits is prima facie evidence of the existence of a partnership. It is not, however, conclusive evidence. Partnership involves more than merely sharing the profits of a business, and if the parties prove that they intended to form none of the other elements of partnership they will not be considered as partners. They may show that the profits were to be shared in some other right.<sup>55</sup> Their intention is gathered from the whole contract, and the surrounding circumstances control. Thus, where a father paid a sum of money as his infant son's share of the capital of the partnership, and it was agreed that during the son's minority the profits should be accounted for to the father, it was held that the father was not himself a partner.<sup>56</sup> The presumption that a partnership exists may be rebutted by showing that the profits were received by one of the alleged partners as interest on or payment of a loan;<sup>57</sup> or

If they participate in the profits as being jointly entitled to the profits, that, unless explained, would lead to the conclusion that the business is the joint business of the two, and this would be partnership." Cotton, L. J., in *Badeley v. Consolidated Bank*, L. R. 38 Ch. Div. 238, at page 250.

The receipt of a share of profits in a business is, under section 2, subsec. 3, English Partnership Act, 1890, prima facie evidence of a partnership. *Buford v. Lewis*, 87 Ark. 412, 112 S. W. 963; *JOHNSON BROS. v. CARTER & CO.*, 120 Iowa, 355, 94 N. W. 850, *Gilmore, Cas. Partnership*, 54; *Boreing v. Wilson & Moss*, 108 S. W. 914, 33 Ky. Law Rep. 14; *Weiss v. Hamilton*, 40 Mont. 99, 105 Pac. 74. See "*Partnership*," *Dec. Dig. (Key No.)* §§ 4-13, 30; *Cent. Dig.* §§ 15-28, 38-48.

<sup>55</sup> "The way in which the profits are to be shared is the essence of the matter; and when the right to profits arises by virtue of an express contract, and does not flow from the relation of the parties, the right exists qua debt, and not by virtue of a partnership." *Lindley, Partn. (Wentw. Ed.)* p. 13, note 2. *FECHTELER v. PALM BROS. & CO.*, 133 Fed. 462, 66 C. C. A. 336, *Gilmore, Cas. Partnership*, 76; *Pierpont v. Lanphere*, 104 Ill. App. 232; *Beard v. Rowland*, 71 Kan. 873, 81 Pac. 188; *Leonard v. Sparks*, 109 La. 543, 33 South. 594; *Sawyer v. Burris*, 141 Mo. App. 108, 121 S. W. 321. See "*Partnership*," *Dec. Dig. (Key No.)* §§ 4-13, 30; *Cent. Dig.* §§ 15-28, 38-48.

<sup>56</sup> *Barklie v. Scott*, 1 Huds. & B. 83. See "*Partnership*," *Dec. Dig. (Key No.)* §§ 4-13, 17, 30; *Cent. Dig.* §§ 3, 15-28, 38-48.

<sup>57</sup> *Ex parte BRIGGS*, *In re NOTLEY*, 3 Deac. & Ch. 367, *Gilmore, Cas. Partnership*, 4; *MOLLWO, MARCH & CO. v. COURT* of

that they were received as compensation for services rendered;<sup>61</sup> or that they were shared as income or rent from property owned in common, as, for example, where two persons bought a circus, and agreed that one should run it and that the income should be divided.<sup>62</sup>

WARDS, L. P. 4 P. C. 419; POOLEY v. DRIVER, 5 Ch. Div. 458; Magovern v. Robertson, 116 N. Y. 61, 22 N. E. 398, 5 L. R. A. 589; HACKETT v. STANLEY, 115 N. Y. 625, 22 N. E. 745, Gilmore, Cas. Partnership, 27; Richardson v. Hughitt, 76 N. Y. 55, 32 Am. Rep. 267; LEGGETT v. HYDE, 58 N. Y. 272, 17 Am. Rep. 244, Gilmore, Cas. Partnership, 22; Waverly Nat. Bank v. Hall, 150 Pa. 466, 24 Atl. 665, 30 Am. St. Rep. 823; Boston & C. Smelting Co. v. Smith, 13 R. I. 27, 43 Am. Rep. 3; POLK v. BUCHANAN, 5 Sneed (Tenn.) 721; Ford v. Smith, 27 Wis. 261; MEEHAN v. VALENTINE, 145 U. S. 611, 12 Sup. Ct. 972, 36 L. Ed. 835, Gilmore, Cas. Partnership, 45. In case of an alleged lending, very slight power of control may turn the scale in favor of a partnership. See "*Partnership*," *Dec. Dig. (Key No.)* §§ 6, 30; *Cent. Dig.* §§ 17-19, 40.

<sup>61</sup> SODIKER v. APPELGATE, 24 W. Va. 411, 49 Am. Rep. 252, Gilmore, Cas. Partnership, 5; Regina v. McDonald, 7 Jur. N. S. 1127; Pott v. Eyton, 3 C. B. 32; Ross v. Parkyns, L. R. 20 Eq. 33; Berthold v. Goldsmith, 24 How. 536, 16 L. Ed. 762; Brown v. Hicks (C. C.) 24 Fed. 811; Hodges v. Dawes, 6 Ala. 215; Le Fevre v. Castagnio, 5 Colo. 564; Pond v. Cummins, 50 Conn. 372; Burton v. Goodspeed, 69 Ill. 237; Holbrook v. Oberne, 56 Iowa, 324, 9 N. W. 291; Shepard v. Pratt, 16 Kan. 209; Hallet v. Desban, 14 La. Ann. 529; Reddington v. Lanahan, 59 Md. 429; Partridge v. Kingman, 130 Mass. 476; Fairly v. Nash, 70 Miss. 193, 12 South. 149; Webb v. Liggett, 6 Mo. App. 345; Waggoner v. First Nat. Bank of Creighton, 43 Neb. 84, 61 N. W. 112; Mason v. Hackett, 4 Nev. 420; Bromley v. Elliot, 38 N. H. 287, 75 Am. Dec. 182; Voorhees v. Jones, 29 N. J. Law, 270; Lewis v. Greider, 51 N. Y. 231; Bartlett v. Levy, 2 Stro. 471; Cherry v. Owsley (Tex.) 10 S. W. 519; Jackson v. Haynie's Adm'r, 106 Va. 365, 56 S. E. 148; Nicholas v. Thielges, 50 Wis. 491, 7 N. W. 341. See "*Partnership*," *Dec. Dig. (Key No.)* §§ 9, 30; *Cent. Dig.* §§ 23, 24, 43, 44.

<sup>62</sup> QUACKENBUSH v. SAWYER, 54 Cal. 439, Gilmore, Cas. Partnership, 66; Parker v. Fergus, 43 Ill. 437; Chapman v. Eames, 67 Me. 452; Thompson v. Snow, 4 Me. 264, 16 Am. Dec. 263; HOLMES v. OLD COLONY R. CORP., 5 Gray (Mass.) 58; BEECHER v. BUSH, 45 Mich. 188, 7 N. W. 785, 40 Am. Rep. 465, Gilmore, Cas. Partnership, 49; Kellogg Newspaper Co. v. Farrell, 88 Mo. 594; Austin v. Neil, 62 N. J. Law, 462, 41 Atl. 834; Helmstreet v. Howland, 5 Denio (N. Y.) 68; Dunham v. Rogers, 1 Pa. 255; Friedlander v. Hillcoat (Tex.) 14 S. W. 786. See "*Partnership*," *Dec. Dig. (Key No.)* §§ 8, 30; *Cent. Dig.* §§ 21, 22, 42.

### SAME—SHARING PROFITS AND LOSSES

12. An agreement to share the profits and losses of a business is prima facie evidence of an intention to form a partnership.

Ordinarily, when two or more persons become co-propriators of a business, they intend and expect to share both the profits and losses of such business—the profits, because that is the inducement which causes them to enter into the relationship; the losses, because as a rule no one will enter a business with another except upon the condition that that other shall bear his share of the risk. The intention to engage in a common business is the true test of partnership; therefore those who engage in such a business under an agreement to share the profits and losses are as a matter of law partners. Since a case will rarely be found in which one will agree to share the losses of a business in which he is not a principal, in the conduct of which he has not a right to participate, a partnership is found in practically all cases where an agreement is made to share the profits and losses of a common enterprise. Therefore the existence of such an agreement is very strong evidence that a partnership exists. It is evidence so strong that it has sometimes been thought to be conclusive.<sup>63</sup> Yet it is certainly not necessarily inconsistent with the existence of an agreement to share profits and losses that the parties never intended to engage in a common business.<sup>64</sup> Consequently, where the plaintiff agreed to cul-

<sup>63</sup> *Scott v. Campbell*, 30 Ala. 728; *Miners' Co-operative Ass'n v. The Monarch*, 2 Alaska, 383; *Brooke v. Tucker*, 149 Ala. 96, 43 South. 141. See "*Partnership*," *Dec. Dig. (Key No.)* §§ 11, 12, 30; *Cent. Dig.* §§ 26, 27, 46, 47.

<sup>64</sup> In the earlier editions of Lindley's *Law of Partnership* this statement appeared: "Whatever difference of opinion there may be as to other matters, persons engaged in any trade, business or adventure, upon the terms of sharing the profits and losses arising therefrom, are necessarily to some extent partners in that trade, business or adventure; nor is the writer aware of any case in

tivate defendant's farm, each to pay half the expense and receive half of the profits, a charge to the jury that they were partners was held erroneous;<sup>65</sup> and an agreement between A. and B., rival buyers of cattle, to buy each for himself as before, but each to share equally in the profits and losses of every shipment, was held not to constitute a partnership.<sup>66</sup> An agreement to share profits and losses is, however, *prima facie* evidence of an intention to form a partnership.<sup>67</sup>

which persons who have agreed to share profits have been held not to be partners."

Prof. Ames criticises this statement in a note to his *Cases on Partnership*, p. 124, saying: "But this statement, it is conceived, is much too sweeping. An agreement to share profits and losses creates a strong, but not conclusive, presumption of a partnership between the parties, as appears from the following authorities: *MOORE v. DAVIS*, 11 Ch. Div. 261 (semble); *Stevens v. Feucet*, 24 Ill. 483; *Chaffraix v. Price*, 29 La. Ann. 176; *DWINEL v. STONE*, 30 Me. 384 (semble); *Howe v. Howe*, 99 Mass. 71 (semble); *DONNELL v. HARSHE*, 67 Mo. 170, *Gilmore, Cas. Partnership*, 63; *Musser v. Brink*, 68 Mo. 242 (semble); *Osbrey v. Reimer*, 49 Barb. (N. Y.) 265."

The later editions of Lord Lindley's work (7th Ed. p. 46) have altered the last clause of the quotation given, so that it reads: "Nor is the writer aware of any case in which persons who have agreed to share profits and losses in this sense have been held not to be partners." That is, "in this sense" means "as persons engaged in any trade, business, or adventure." *National Surety Co. v. T. B. Townsend Brick & Contracting Co.*, 74 Ill. App. 312, affirmed 176 Ill. 156, 52 N. E. 938. See "*Partnership*," *Dec. Dig. (Key No.)* §§ 4-13, 30; *Cent. Dig.* §§ 15-28, 38-48.

<sup>65</sup> *DONNELL v. HARSHE*, 67 Mo. 170, *Gilmore, Cas. Partnership*, 63. See "*Partnership*," *Dec. Dig. (Key No.)* § 3; *Cent. Dig.* § 13.

<sup>66</sup> *CLIFTON v. HOWARD*, 89 Mo. 192, 1 S. W. 26, 58 Am. Rep. 97. See "*Partnership*," *Dec. Dig. (Key No.)* §§ 3, 17, 30; *Cent. Dig.* §§ 3, 13, 14, 47.

<sup>67</sup> "If the question in this case had depended on the simple question whether sharing in profits and losses constituted a partnership, so as to authorize one party to pledge the other's credit, I should have thought the direction right; as, since the decision in *COX v. HICKMAN*, 8 H. L. C. 268 [*Gilmore, Cas. Partnership*, 31], it has been the law that sharing in profits and losses does not in itself constitute a partnership, but only affords a strong presumption that the one party is made the agent for the other." *Blackburn, J.*, in *Noakes v. Barlow*, 26 L. T. N. S. 136. See "*Partnership*," *Dec. Dig. (Key No.)* §§ 4-13, 17, 30; *Cent. Dig.* §§ 3, 15-28, 38-48.

The inference that the parties did not intend to become partners is stronger, however, than in the case of an agreement to share profits only, simply because an agreement to share profits and losses without intending to become partners is more rare than an agreement to share profits only without a like intention. Hence stronger evidence would be required to rebut such prima facie evidence.

### COMMON OWNERSHIP OF PROPERTY

#### 13. Common ownership of property does not create a partnership between the parties.

As has been indicated, the true test of partnership is an agreement to engage in a joint business. It is a common incident of such an agreement that the parties should jointly contribute a capital to be owned in common, to be used in the partnership business, and in the payment of partnership debts. Yet common ownership of property constituted a well-known and clearly defined relation in the common law before partnership was introduced from the law merchant. Hence, while a usual result of partnership, and in that sense evidence that a partnership exists, it does not of itself prove that there is a partnership. Moreover, it should not have that effect; for such ownership is not necessarily founded on a contract between the parties, and does not in any way depend upon their mutual confidence.

Property owned in common is not necessarily held for gain, as is partnership property. The mere fact, however, that it produces a profit in the way of income or rent, ought not to involve the owners in an unwilling partnership. Hence the common ownership of property, combined with a sharing of the profits arising from the use of such property, does not create a partnership.\*\* For example, A. and

\*\* "Joint tenancy, tenancy in common, joint property, common property, or part ownership does not of itself create a partnership as to anything so held or owned, whether the tenants or owners do

B., being tenants in common of a horse, agreed that A. should have the general management of the horse, training and racing him, and that the expense and winnings should be equally divided. It was held that they were not partners so far as the keep of the horse was concerned.<sup>69</sup> The owners of an undivided interest in the leases of certain oil wells, who agreed to share in the expense of operating the leases and of mining the oil, were held not to be partners. "They were engaged in the development and operation of the common property for their undivided benefit. They were doing what tenants in common may properly do, and in the only way practical for them, viz., turning the common property to the profit of its owners, at their individual cost, and dividing the product between themselves."<sup>70</sup> Also, where a circus property was transferred to two persons as security for a debt, and it was agreed that one should take charge of the circus, 'make exhibitions, and apply the receipts first to the payment of the other, then of himself, it was held that the receipts came into his hands as trustee, and not as partner.<sup>71</sup> Where, however, co-owners of property use such property in joint business, they become partners in such business. The difficulty will always be to determine whether or not they have gone into business.<sup>72</sup> For instance, in reference to the remarks of

or do not share any profits made by the use thereof." English Partnership Act, 1890, § 2 (1).

<sup>69</sup> FRENCH v. STYRING, 2 C. B. N. S. 357. "It is no more a partnership than if two tenants in common of a house agreed that one of them should have the general management, and provide funds for necessary repairs, so as to render the house fit for habitation of a tenant, and that the net rent should be divided between them equally." Per Willes, J., at page 366 of above case. See "Partnership," *Dec. Dig. (Key No.)* §§ 3, 30; *Cent. Dig.* §§ 13, 14, 38.

<sup>70</sup> BUTLER SAVINGS BANK v. OSBORNE et al., 159 Pa. 10, 13, 28 Atl. 163, 39 Am. St. Rep. 605, Gilmore, Cas. Partnership, 58. See "Partnership," *Dec. Dig. (Key No.)* §§ 3, 30; *Cent. Dig.* §§ 13, 14, 38.

<sup>71</sup> QUACKENBUSH v. SAWYER, 54 Cal. 439, 5 Pacific Coast Law J. 277, Gilmore, Cas. Partnership, 66. See "Partnership," *Dec. Dig. (Key No.)* § 5; *Cent. Dig.* § 15.

<sup>72</sup> NOYES v. CUSHMAN et al., 25 Vt. 390, Gilmore, Cas. Partnership, 65. See "Partnership," *Dec. Dig. (Key No.)* §§ 4-13; *Cent. Dig.* §§ 15-28.

Willes, J., in *French v. Styring*,<sup>73</sup> Pollock says:<sup>74</sup> "But if they furnished the house at their joint expense, and then let portions of the house as lodging, they might well be partners. Letting a house is not a business, but letting furnished rooms is." It is in the business that the partnership exists, however, and not in the property. Common owners of property may at the same time be partners in business, and the mere fact that they use the common property in the partnership business does not make such property partnership property, any more than does the use of the property of one partner in the partnership business make such property partnership property. Whether or not joint property becomes partnership property depends upon the agreement of the parties.<sup>75</sup>

<sup>73</sup> *FRENCH v. STYRING*, 2 C. B. N. S. 357. See "*Partnership*," *Dec. Dig. (Key No.)* §§ 4-13; *Cent. Dig.* §§ 15-28.

<sup>74</sup> In note 1, p. 3, of *Digest of the Law of Partnership* (8th Ed.).

<sup>75</sup> "I think the fair result of the evidence is that there was no partnership between the plaintiff and the defendant in the horse in question. They were owners in common, each being entitled to an undivided moiety—part owners, but not partners in the ordinary sense of the term. I incline to agree with the defendant's counsel that, though not partners in the horse, the plaintiff and defendant might be partners in the mode of working and managing it for their common good." Cockburn, C. J., in *FRENCH v. STYRING*, 2 C. B. N. S. 357, 363. See *Bryant v. Fitzsimmons*, 106 Md. 421, 67 Atl. 356.

"It is not necessary to constitute a partnership that there should be any property constituting the capital stock which shall be jointly owned by the partners. But the capital may consist in the mere use of property owned by the individual partners separately." *Walworth, C.*, in *CHAMPION v. BOSTWICK*, 18 Wend. (N. Y.) 182, 31 Am. Dec. 376.

"If, then, it is true that the parties were owners in common of the property before the agreement was made, and the agreement specially preserves their title as such through the time that the business as to which they were partners lasted, and the use of such property owned in common by them for the business does not make it partnership property, under the circumstances of this case, the plaintiffs have no right to a judgment that the property be sold in the winding up of the partnership business." *Sedgwick, J.*, in *Auten v. Ellingwood*, 51 How. Prac. (N. Y.) 359, 365; *Holton v. Guinn* (C. C.) 76 Fed. 96; *Hendy v. March*, 75 Cal. 566, 17 Pac. 702; *Merritt v. Walsh*, 32 N. Y. 685. See "*Partnership*," *Dec. Dig. (Key No.)* §§ 4-13, 30; *Cent. Dig.* §§ 15-28, 38-48.

## JOINT ENTERPRISE OR BUSINESS

## 14. Engaging as co-owners in a joint enterprise or business for profit to be shared creates a partnership.

In order to create a partnership, there must be something more than the engaging in a common enterprise, even though that enterprise be entered upon with a view to profit. A joint agreement to do a piece of work for a third person and divide the payments does not necessarily make the parties partners. The fact that payments were to be immediately divided, instead of being placed in a common fund, indicated in the case in question that they did not intend to form a partnership.<sup>76</sup> Neither does a joint agreement to arrest a criminal and divide the reward offered;<sup>77</sup> nor a joint enterprise to make a single haul of fish and divide them equally.<sup>78</sup> There must be a joint business, not in any technical sense, but actually. In the above illustrations the parties would not have been ordinarily understood as being engaged in business, nor were they. In *Coope v. Eyre*,<sup>79</sup> the parties agreed that one should purchase oil, which was to be divided among all, each paying the one who made the purchases his share of the purchase price. It was held that they were not partners. So, also, in *Gibson v. Lupton*,<sup>80</sup> where two persons joined in the purchase of some wheat to be divided and paid for equally. In neither case was there a joint business. Had the purchases been made with the intention of reselling, they

<sup>76</sup> *FINKLE v. STACEY*, Menaghten's Sel. Cas. in Chan. 9; *Willis v. Crawford*, 38 Or. 522, 63 Pac. 985, 64 Pac. 866, 53 L. R. A. 904. See "Partnership," Dec. Dig. (Key No.) § 11; Cent. Dig. § 26.

<sup>77</sup> *Dawson v. Gurley*, 22 Ark. 381. See "Partnership," Cent. Dig. § 14.

<sup>78</sup> *Hurley v. Walton*, 63 Ill. 260. See "Partnership," Dec. Dig. (Key No.) § 5; Cent. Dig. § 16.

<sup>79</sup> 1 H. Bl. 37. See "Partnership," Dec. Dig. (Key No.) §§ 4-13, 30; Cent. Dig. §§ 15-28, 38-48.

<sup>80</sup> 9 Bing. 297. See "Partnership," Dec. Dig. (Key No.) §§ 4-13, 30; Cent. Dig. §§ 15-28, 38-48.

would have been partners.<sup>81</sup> It should not be understood from the above cases that a single transaction may not constitute a partnership. A partnership may be created for one adventure only, as well as a series of adventures, provided that it is a business adventure.<sup>82</sup>

### RELATIONS DISTINGUISHABLE FROM PARTNERSHIP

15. There are various relations bearing some resemblance to partnership, and having certain characteristics of partnerships, which should be distinguished as follows:

- (1) Corporations.
- (2) Joint ownership of property.
  - (a) Coparcenary.
  - (b) Joint tenancy.
  - (c) Tenancy in common.
- (3) Associations not for profit.

#### *Partnership Distinguished from a Corporation*

It is frequently convenient for men engaged in business to unite their capital and efforts in a common business. It may be that each one alone has not the capital or the

<sup>81</sup> HOARE v. DAWES, 1 Doug. 371, Gilmore, Cas. Partnership, 1; REID v. HOLLINGSHEAD, 4 B. & C. 867; Worsham v. Vignal, 14 Tex. Civ. App. 324, 37 S. W. 17; McNealy v. Bartlett, 123 Mo. App. 58, 99 S. W. 767.

In GOELL v. MORSE, 126 Mass. 480, two persons bought a horse, intending to resell, but it was agreed that neither should have power to sell without the concurrence of the other. This was held not to be a partnership. It would seem, however, that it might more properly have been held to be a partnership with limited authority. See "Partnership," Dec. Dig. (Key No.) §§ 4-13, 30; Cent. Dig. §§ 15-28, 38-48.

<sup>82</sup> Heyhoe v. Burge, 9 C. B. 431; Smith v. Watson, 2 B. & C. 401; Kayser v. Maugham, 8 Colo. 232, 6 Pac. 803; Jones v. Davies, 60 Kan. 309, 56 Pac. 484, 72 Am. St. Rep. 354; Spencer v. Jones, 92 Tex. 516, 50 S. W. 118, 71 Am. St. Rep. 870. See Partnership Act, 1890, § 32, subsec. "b," as to the termination of such partnership. See "Partnership," Dec. Dig. (Key No.) § 5; Cent. Dig. § 16.

credit to prosecute the business successfully. There may be many other reasons why they find it convenient to unite their forces. One way of combining their interests for purposes of business is to form a partnership. One important characteristic of a partnership is the unlimited liability of each of the members for the debts incurred in conducting the joint business. Another way of uniting their interests and gaining the benefits of combined capital and credit is to form a corporation. One important characteristic of a corporation is the limited liability of its stockholders. It becomes important to distinguish a partnership from a corporation.

A corporation is a legal entity or person created by special authority from the state or the sovereign. Though it consists of a number of individuals, it has a legal existence apart from any of them. Hence it may sue or be sued in its corporate name. It may sue its own members and be sued by them. It may own property and incur liabilities with respect to it. It owns the profits made in any business in which it may engage. The death or retirement of a stockholder, by sale or otherwise, does not in any way affect the identity of the corporation. The liability of the shareholders does not, ordinarily, extend beyond the amount of their subscriptions to the capital stock.

On the other hand, a partnership is created by the agreement of the parties. Though it transacts business as an individual might, it has no legal existence apart from the members composing it. It is not a legal person, and can acquire no rights and incur no liabilities. Hence it cannot sue or be sued as an entity. Its property is their property. Its rights are their rights, and can be enforced by them. Its liabilities are their liabilities, and can be enforced against them. The death or retirement of a member destroys the partnership. Each member is individually liable for the whole of the obligations of the partnership, even though he has paid in full his contribution to the partnership capital.<sup>83</sup>

<sup>83</sup> In re GIBBS' ESTATE, 157 Pa. 59, 27 Atl. 383, 22 L. R. A. 276, Gilmore, Cas. Partnership, 91; La Cotts v. Pike. 91 Ark. 26, 120 S.

*Common Ownership—In general*

The property owned by a partnership is held in one form of co-ownership. It is one of the incidents of partnership that the capital contributed and the profits realized are owned in common. Co-ownership of property may exist, however, without arising from a partnership, or without creating one. The usual forms of co-ownership recognized by the common law are coparcenary, joint tenancy, and tenancy in common. A brief examination of these forms of co-ownership is necessary to a proper understanding of partnership ownership.

*Same—Coparcenary*

Coparcenary was the term applied at common law to the tenancy which existed where, as under the common law, the female descendants, or, as under special custom, the male descendants of equal degree, took jointly, yet as a single heir, by descent from a common ancestor. Since it only applied to property held by descent, it applied to real property only. The relationship was imposed upon the parties by operation of law, and their consent was immaterial. Neither had any power of disposal over the shares of the rest as a partner would have; but each could dispose of his own share and introduce a new party, which a partner could not do. In case one coparcener did dispose of his interest, the coparcenary would cease to exist and become a tenancy in common. The grantee would become a co-owner, but not a coparcener.<sup>84</sup> Coparcenary has in this country never existed, except in Maryland; estates which under the common law would be estates in coparcenary being declared either by statute or by judicial legislation to be tenancies in common.<sup>85</sup>

*Same—Joint Tenancy*

Joint tenancy is created when a conveyance is made to two or more jointly. Being a conveyance by act of the par-

W. 144, 134 Am. St. Rep. 48. See "Partnership," Dec. Dig. (Key No.) §§ 3, 5; Cent. Dig. §§ 13-28.

<sup>84</sup> 2 Bl. Com. c. 12, p. 187.

<sup>85</sup> 1 Washburn on Real Property, 651; Tiedeman on Real Property (2d Ed.) 202.

ties, it might consist of an interest in personalty as well as of an interest in land. The joint owners were called joint tenants. Though none of them could dispose of the whole, each could dispose of his interest. Since all joint tenants hold by the same title, the grantee of a single joint tenant, though a co-owner, would not become a joint tenant. A sale by one destroyed the joint tenancy, and created a tenancy in common.<sup>86</sup> Though a tenancy in common in real estate might be created in the same way as a joint tenancy—i. e., by a conveyance to two or more by apt words in the conveyance—the common law was inclined in case of doubt to construe the conveyance as creating a joint tenancy rather than a tenancy in common; the former being more beneficial to the feudal lord. In a devise, however, the contrary rule prevailed. In a joint tenancy, upon the death of one joint tenant, his share accrued to the survivors; in a tenancy in common, this rule of survivorship did not obtain. Hence a devise was, if possible, construed as creating a tenancy in common; it being presumed that the deviser had intended that which was most beneficial for the devisees.<sup>87</sup> The presumption that existed in favor of the creation of a tenancy in common in a devise came to exist also in a conveyance by deed, when once the courts were freed of feudal influences.<sup>88</sup>

In the United States joint tenancies have never been favored, though, except in Ohio, they have generally existed in this country till abolished by statute. There is, however, in general, a presumption, either judicial or statutory, against their creation, and in some states they have been expressly abolished by statute.<sup>89</sup> Therefore the common form of co-ownership, apart from partnership ownership, is tenancy in common.

#### *Same—Tenancy in Common*

A tenancy in common, though it may be created in the same manner as a joint tenancy—i. e., by a conveyance to

<sup>86</sup> 2 Bl. Com. c. 12, p. 180.

<sup>87</sup> 2 Bl. Com. c. 12, p. 193.

<sup>88</sup> *Fisher v. Wigg*, 1 P. Wms. 14, note; *York v. Stone*, 1 Salk. 158; *Fisher v. Wigg*, 1 Salk. 392, note 2; *Rigden v. Vallier*, 28 Ves. Sr. 252, 258. See "*Wills*," *Dec. Dig.* (Key No.) § 627; *Cent. Dig.* §§ 1452-1459.

<sup>89</sup> See *Joint Tenancy*, *Dec. Dig.* (Key No.) § 2; *Cent. Dig.* § 2.

two or more jointly—may also be created by the conveyance of an undivided interest to different individuals at different times by separate conveyances. Therefore there need be no concurrence of action, even in the inception of the relationship. Each tenant in common may, moreover, introduce new tenants in common without the consent of the others, by selling all or part of his interest. He has, however, no power over the interest of his fellow tenants. Due to the disfavor with which the survivorship of joint tenancy is viewed, tenancy in common has come to be the usual form of co-ownership in this country. Therefore property owned in common is now ordinarily owned in partnership or in tenancy in common.\*\*

#### *Organizations Not for Profit*

Partnerships were originally composed of merchants, who had combined in order to gain mutual profit from dealing in commodities. Partnership is not confined to mercantile enterprises, however, as it has long been held that lawyers, physicians, and other nontrading persons, may become partners by combining their forces for mutual profit. Yet the object of every partnership must be the acquisition of gain. Partnership is a business relation, and

\*\* The principal differences between partnership ownership and other forms of co-ownership is summed up in Lindley on Partnership as follows:

"1. Co-ownership is not necessarily the result of an agreement. Partnership is. 2. Co-ownership does not necessarily involve community of profit or of loss. Partnership does. 3. One co-owner can, without the consent of the others, transfer his interest to a stranger, so as to put him in the same position as regards the other owner as the transferor himself was before the transfer. A partner cannot do this. 4. One co-owner is not as such the agent, real or implied, of the others. A partner is. 5. One co-owner has no lien on the thing owned in common for outlays or expenses, nor for what may be due from the others as their share of a common debt. A partner has. 6. One co-owner of land is entitled to have it divided between himself and co-owners, but not (except by virtue of the Partition Acts) to have it sold against their consent. A partner has no right to partition in specie, but is entitled, on a dissolution, to have the partnership property, whether land or chattels, sold, and the proceeds divided." Lindley, *Law of Partnership* (7th Ed.) p. 26.

the purpose of every business is gain. Therefore no association or combination which is not formed for gain constitutes a partnership. Members of social, religious, charitable, political, and commercial societies or clubs are not partners.<sup>91</sup> As the members of such organizations are not partners, their liability to third persons must depend upon the principles of the law of agency. No liability attaches by virtue of membership in the association; hence liability for the acts of the representatives cannot be fastened on a member by merely proving his membership. Actual authority, as in other cases of principal and agent, must be proved.<sup>92</sup> As between the members, their liability is determined by their contract, and is usually limited to a definite subscription or assessment;<sup>93</sup> and an action at law may be maintained for unpaid subscriptions.<sup>94</sup>

The fact that persons unite for mutual benefit does not alone make them partners. They must derive that benefit from the conduct of a joint business. It has been repeatedly decided that joint purchasers of property with intent to divide are not partners. They are not engaged in a joint business. Beneficial associations are not partnerships, unless they engage in business.<sup>95</sup> Thus it has been held that

<sup>91</sup> *REG. v. ROBSON*, L. R. 16 Q. B. Div. 137, *Gilmore, Cas. Partnership*, 85; *Caldicott v. Griffiths*, 8 Ex. 898; *Pipe v. Batement*, 1 Iowa, 369; *Teed v. Parsons*, 202 Ill. 455, 66 N. E. 1044; *BURT v. LATHROP*, 52 Mich. 106, 17 N. W. 716, *Gilmore, Cas. Partnership*, 57; *White v. Brownell*, 3 Abb. Prac. N. S. (N. Y.) 318; *Local Union No. 1, Textile Workers, v. Barrett*, 19 R. I. 663, 36 Atl. 5. See "*Partnership*," *Dec. Dig. (Key No.)* §§ 1, 41; *Cent. Dig.* § 56; "*Associations*," *Cent. Dig.* § 1; "*Clubs*," *Cent. Dig.* § 1.

<sup>92</sup> *Wise v. Perpetual Trustee Co.*, [1903] A. C. 139; *Fleming v. Hector*, 2 M. & W. 172; *Luckombe v. Ashton*, 2 Fas. & Fin. 705; *Dunham v. Loverock*, 158 Pa. 197, 27 Atl. 990, 38 Am. St. Rep. 838. See "*Partnership*," *Cent. Dig.* § 7.

<sup>93</sup> *Wise v. Perpetual Trustee Co.*, [1903] A. C. 139; *Harington v. Sendall*, [1903] 1 Ch. 921. See "*Partnership*," *Dec. Dig. (Key No.)* §§ 70, 71; *Cent. Dig.* §§ 114-116.

<sup>94</sup> *Hall v. Thayer*, 12 Metc. (Mass.) 130. See "*Subscriptions*," *Cent. Dig.* §§ 10, 25.

<sup>95</sup> *State ex rel. Hadley v. Kansas City Live Stock Exchange*, 211 Mo. 188, 109 S. W. 675, 124 Am. St. Rep. 776; *Webster v. Taplin, Rice & Co.*, 29 Ohio Cir. Ct. R. 543, affirmed 76 Ohio St. 590, 81 N.

mutual insurance companies, where each member is an insurer of the others, are not partnerships.<sup>96</sup> Though each member expects to obtain a financial benefit through his membership, they are not in business, which implies dealing with a third person for gain; hence are not partners. The same is true of secret lodges which insure the members.<sup>97</sup> Also an organization of farmers to conduct a telephone exchange for their mutual convenience was held not to constitute a partnership.<sup>98</sup> Also where property is bought to be divided, it is held that members of a co-operative association formed for the purpose of buying goods to be resold to the members are not partners. Where, however, they engage in selling to persons who are not members, they engage in a business enterprise, and become partners.<sup>99</sup>

E. 1196. See "*Partnership*," *Dec. Dig. (Key No.)* §§ 4-13; *Cent. Dig.* §§ 15-28.

<sup>96</sup> Strong v. Harvey, 3 Bing. 304; Redway v. Sweeting, L. R. 2 Ex. 400; Gray v. Pearson, L. R. 5 C. P. 568; Andrews & Alexander's Case, 8 Eq. 176. See "*Insurance*," *Dec. Dig. (Key No.)* § 55; *Cent. Dig.* § 68.

<sup>97</sup> Burke v. Roper, 79 Ala. 138; Kuhl v. Meyer, 35 Mo. App. 206; Lafond v. Deems, 81 N. Y. 507. Contra: Gorman v. Russell, 14 Cal. 531. See, however, Civ. Code Cal. § 603, and St. Cal. 1873-74, p. 745. In Pennsylvania such organizations are held to create partnerships, and except as exempted by statute, the members are held liable as such. Babb v. Reed, 5 Rawle, 151, 28 Am. Dec. 650; Pritchett v. Schafer, 2 Wkly. Notes Cas. 317; Pain v. Sample, 158 Pa. 428, 27 Atl. 1107; Sparks v. Husted (Com. Pl.) 5 Pa. Dist. R. 189. See "*Insurance*," *Dec. Dig. (Key No.)* § 694; *Cent. Dig.* § 1834.

<sup>98</sup> Meinhart v. Draper, 133 Mo. App. 50, 112 S. W. 709; Branagan v. Buckman, 67 Misc. Rep. 242, 122 N. Y. Supp. 610. See "*Partnership*," *Dec. Dig. (Key No.)* §§ 1, 5, 15.

<sup>99</sup> Teed v. Parsons, 202 Ill. 455, 66 N. E. 1044; Hodgson v. Baldwin, 65 Ill. 532; Manning v. Gasharle, 27 Ind. 399; Beaman v. Whitney, 20 Me. 413; Atkins v. Hunt, 14 N. H. 205; Farnum v. Patch, 60 N. H. 294, 49 Am. Rep. 313; Edgerly v. Gardner, 9 Neb. 130, 1 N. W. 1004; Smith v. Hollister, 32 Vt. 695; Stimson v. Lewis, 36 Vt. 91; Tenney v. New England Protective Union, Division No. 172, 37 Vt. 64; Henry v. Jackson, 37 Vt. 431. See "*Partnership*," *Dec. Dig. (Key No.)* §§ 3, 41; *Cent. Dig.* §§ 13, 14, 56.

## CONTRACT FOR A PARTNERSHIP

16. A contract for a partnership to arise in the future or upon the happening of a contingency does not make the parties thereto partners until the time prescribed has elapsed, or until the contingency has happened.

Though partnership arises by contract, the making of an executory contract of partnership does not create a partnership. If the partnership is not to take effect till a certain time has elapsed, or a certain contingency has happened, no partnership will exist until the elapsing of the time or the happening of the contingency.<sup>1</sup> "A marked distinction exists in law between an agreement to enter into the copartnership relation at a future day and a copartnership actually consummated. It is an elementary principle that a partnership in fact cannot be predicated upon an agreement to enter into a copartnership at a future day, unless it be shown that such agreement was actually consummated. In the language of the text-books, the partnership must be 'launched.' To constitute the relation, therefore, the agreement between the parties must be an executed agreement. So long as it remains executory, the partnership is inchoate, not having been called into being by the concerted action necessary under the partnership agreement. It is undoubtedly true that a partnership in

<sup>1</sup> DOW v. STATE BANK OF SLEEPY EYE, 88 Minn. 355, 93 N. W. 121, Gilmore, Cas. Partnership, 87; Dickinson v. Valpy, 10 B. & C. 128; Reboul v. Chalker, 27 Conn. 114; Johnston v. Elchelberger, 13 Fla. 230; Wilson v. Wilson, 6 Idaho, 597, 57 Pac. 708; Metcalf v. Redmon, 43 Ill. 264; Haskins v. Burr, 106 Mass. 48; Bird v. Hamilton, Walk. Ch. (Mich.) 361; Westwood v. Cole, 66 Misc. Rep. 53, 120 N. Y. Supp. 884; Atkins v. Hunt, 14 N. H. 205; Matter of Hoagland, 51 App. Div. 347, 64 N. Y. Supp. 920; Mosier v. Parry, 60 Ohio St. 338, 54 N. E. 364; Irwin v. Bidwell, 72 Pa. 244; Buzard v. McAnulty, 77 Tex. 438, 14 S. W. 138; State v. Mendenhall, 24 Wash. 12, 63 Pac. 1109; Holle v. York, 27 Wis. 209; Holgate v. Downer, 8 Wyo. 344, 57 Pac. 918. See "Partnership," Dec. Dig. (Key No.) §§ 20, 21, 40, 57; Cent. Dig. §§ 6, 36, 32.

præsenti may be constituted by an agreement, if it appears that such was the intention of the parties. But where it expressly appears that the arrangement is contingent, or is to take effect at a future day, it is well settled that the relation of partners does not exist, and that, if one or more of them refuse to perform the agreement, there is no remedy between the parties, except a suit in equity for specific performance, or an action at law for the recovery of damages, should any be sustained."<sup>2</sup> It is the present establishment by agreement of the relationship that creates a partnership, not a contract to establish one in the future. Thus an agreement to enter into a partnership according to articles to be later drawn up does not create a partnership.<sup>3</sup>

<sup>2</sup> *Meagher v. Reed*, 14 Colo. 335, 24 Pac. 681, 685, 9 L. R. A. 455. Where there is an agreement to be partners after a fixed time, the mere arrival of such time does not necessarily make the parties partners. Non constat one of them may repudiate the agreement, and elect to respond in damages for breach of contract. The partnership must be launched. See *Doyle v. Bailey*, 75 Ill. 418; *Wilson v. Campbell*, 10 Ill. 383; *Powell v. Maguire*, 43 Cal. 11; *Truitt v. Clark*, 81 Ill. App. 652, affirmed 183 Ill. 239, 55 N. E. 683; *Vance v. Blair*, 18 Ohio, 532, 51 Am. Dec. 467; *Gray v. Gibson*, 6 Mich. 300; *Brink v. New Amsterdam Fire Ins. Co.*, 5 Rob. (N. Y.) 104. See, also, *Queen City Furniture & Carpet Co. v. Crawford*, 127 Mo. 356, 30 S. W. 163; *LATTA v. KILBOURN*, 150 U. S. 524, 14 Sup. Ct. 201, 37 L. Ed. 1169, *Gilmore, Cas. Partnership*, 425. See "*Partnership*," *Dec. Dig. (Key No.)* §§ 20, 21, 29, 40; *Cent. Dig.* §§ 6, 7, 30-33, 36.

<sup>3</sup> *Syers v. Syers*, 1 App. Cas. 174. The commencement, as to third persons, of a partnership at a time prior to the date of the partnership articles, may be shown by the acts, declarations, and dealings of such persons, as partners, prior to that date, which have induced such third persons to deal with them as partners. *Cain Lumber Co. v. Standard Dry-Kiln Co.*, 108 Ala. 346, 18 South. 882; *Cook v. Carpenter*, 34 Vt. 121, 80 Am. Dec. 670; *Davis v. Evans*, 39 Vt. 182; *Atkins v. Hunt*, 14 N. H. 205; *Hartman v. Woehr*, 18 N. J. Eq. 383; *Morrill v. Spurr*, 143 Mass. 257, 9 N. E. 580; *National Bank of Chemung v. Ingraham*, 58 Barb. (N. Y.) 290; *First Nat. Bank of Gainesville v. Cody*, 93 Ga. 127, 19 S. E. 831. Defendant and plaintiff agreed orally to form a partnership to carry on a hotel purchased by defendant. In contemplation of the fulfillment of this agreement, they began business, made contracts, opened the books, and performed various other acts in the partnership name. When the articles of partnership were drawn up, they could not agree upon the terms, and defendant finally declined to enter into the

An option given to one to become a partner in a present business does not make him a partner. He becomes a partner only upon exercising the option and electing to become a partner.<sup>4</sup> The death of one of the parties before the time fixed upon for the beginning of the partnership, or the failure to perform a condition precedent, will prevent a partnership ever arising.<sup>5</sup> The existence of a partnership is determined, however, by what the parties have done, not by what they think they have done. Therefore a declaration in a preliminary agreement that they do not intend to form a present partnership will not prevent a partnership arising, if what is actually agreed upon and done does create one. Whether one is actually created or not depends upon all of the terms of the agreement and all of the circumstances of the case.<sup>6</sup> Moreover, since no formal instrument of agreement is necessary, the terms of the preliminary agreement may be subsequently varied and performance of its conditions waived;<sup>7</sup> but the waiver of a condition definitely agreed upon is not to be presumed.<sup>8</sup>

partnership. Held, that there was nothing to indicate that the partnership was actually formed, entitling plaintiff to an accounting. *MARTIN v. BAIRD*, 175 Pa. 540, 34 Atl. 809. See "*Partnership*," *Dec. Dig. (Key No.)* §§ 21, 40; *Cent. Dig.* §§ 6, 36.

<sup>4</sup> *SABEL v. SAVANNAH RAIL & EQUIPMENT CO.*, 135 Ala. 380, 33 South. 663, Gilmore, Cas. Partnership, 116; *Ex parte Davis*, 4 De G. J. & S. 523; *Gabriell v. Evill*, 9 M. & W. 297; *Price v. Groom*, 2 Ex. 542; *Howell v. Brodle*, 6 Bing. N. C. 44; *Burnell v. Hunt*, 5 Jur. 650 (Q. B.); *Re Young*, *Ex parte Jones*, [1896] 2 Q. B. 484. See "*Partnership*," *Dec. Dig. (Key No.)* §§ 20, 21, 40, 57; *Cent. Dig.* §§ 6, 7, 36, 82.

<sup>5</sup> *DOW v. STATE BANK*, 88 Minn. 355, 93 N. W. 121, Gilmore, Cas. Partnership, 87; *Metcalf v. Redmon*, 43 Ill. 264. See "*Partnership*," *Dec. Dig. (Key No.)* § 21; *Cent. Dig.* § 6.

<sup>6</sup> *England v. Curling*, 8 Beav. 129, 133; *Arnold v. Conklin*, 96 Ill. App. 373; *Ehrhardt v. Stevenson*, 128 Mo. App. 476, 106 S. W. 1118. See "*Partnership*," *Dec. Dig. (Key No.)* §§ 17-22, 29; *Cent. Dig.* §§ 1-7, 30-33, 38.

<sup>7</sup> *First Nat. Bank of Gainesville v. Cody*, 93 Ga. 127, 19 S. E. 831. See "*Partnership*," *Dec. Dig. (Key No.)* §§ 22, 29, 57; *Cent. Dig.* §§ 8, 32, 82.

<sup>8</sup> *Johnston v. Eichelberger*, 13 Fla. 230; *Bird v. Hamilton*, Walk Ch. (Mich.) 361. See "*Partnership*," *Dec. Dig. (Key No.)* §§ 21, 71; *Cent. Dig.* §§ 6, 115.

## PROMOTERS OF CORPORATIONS

## 17. Those who engaged in the promotion of a corporation do not thereby become partners.

"A promoter is a person who brings about the incorporation and organization of a corporation."<sup>9</sup> If two or more persons agree to combine in promoting a corporation, they do not thereby become partners. Their combination has no more of the elements of a partnership than an agreement to form a partnership at a future date would have.<sup>10</sup> Though it has been stated in England that persons combining for the purpose of procuring the act of Parliament necessary in order to form a company were partners,<sup>11</sup> such statement is clearly inaccurate, and is inconsistent with later decisions.<sup>12</sup> Promoters may, of course, become liable to third persons, but it is not a partnership liability. It is the liability of one who contracts, either himself or by an agent, with another.<sup>13</sup> It may also be true that promoters become in fact partners by actually carrying on, as incidental to the work of forming a corporation, a business enterprise.<sup>14</sup> It is the carrying on of such business, not the combination to effect an incorporation, that makes them partners. It is conceived, also, that promoters might become partners in the business of promoting; i. e., if they

<sup>9</sup> Cook on Corporations, vol. III, p. 2188.

<sup>10</sup> Arnold v. Conklin, 96 Ill. App. 373. See "Partnership," Dec. Dig. (Key No.) § 42; Cent. Dig. § 57; "Corporations," Cent. Dig. § 26.

<sup>11</sup> HOLMES v. HIGGINS, 1 B. & C. 74; Lucas v. Beach, 1 Man. & Gr. 417. See "Partnership," Dec. Dig. (Key No.) § 42; Cent. Dig. § 57.

<sup>12</sup> Reynell v. Lewis, 15 M. & W. 517; Wyld v. Hopkins, Id.; Capper's Case, 1 Sim. N. S. 178. See "Partnership," Dec. Dig. (Key No.) § 42; Cent. Dig. § 57.

<sup>13</sup> Hersey v. Tully, 8 Colo. App. 110, 44 Pac. 854; Whetstone v. Crane Bros. Mfg. Co., 1 Kan. App. 320, 41 Pac. 211. See "Partnership," Dec. Dig. (Key No.) § 42; Cent. Dig. § 57; "Corporations," Cent. Dig. § 26.

<sup>14</sup> Barnett v. Lambert, 15 M. & W. 489. See "Partnership," Dec. Dig. (Key No.) § 42; Cent. Dig. § 57.

engaged in creating successive corporations as an occupation, putting their profits in a common fund, it might well be held that they had made promotion a business, and were partners in that business.<sup>15</sup>

#### <sup>4</sup> LIABILITY OF STOCKHOLDERS IN DEFECTIVE CORPORATIONS

18. Whether stockholders in a defective corporation are liable as partners is a question on which the cases are conflicting. By the weight of authority, such persons are not liable as partners, if they have proceeded far enough in an attempted incorporation to create a de facto corporation.

Persons who, without attempting to incorporate, pretend to be a corporation, or who, though attempting to incorporate, fail for some reason to create a de facto corporation, are liable as partners.

#### *Corporations De Jure and Corporations De Facto*

Corporations are either de jure or de facto. A de jure corporation is one which has legal existence. Not even the state can question its right to operate under its charter, nor deprive it of any power which its charter grants. A corporation de jure is a corporation in law as well as in fact. To create a corporation de jure there must be a law under which the incorporation can be effected and a substantial compliance with the terms of that law. It is not necessary that there be a literal compliance with it. Thus it does not affect the validity of an incorporation if there is a failure to comply with specifications in the statute which are directory merely. Those conditions which by the law are made conditions precedent to incorporation must be complied with; but it does not affect the legal existence of a corporation if there is a failure to comply with conditions precedent, not to incorporation, but to doing business under the corporate charter.<sup>16</sup>

<sup>15</sup> Lindley's Law of Partnership (7th Ed.) p. 20.

<sup>16</sup> "A substantial compliance will make a corporation de jure. But there must be an apparent attempt to perfect an organization

A corporation de facto, as distinguished from a corporation de jure, is a corporation in fact, but which has not been legally organized. Though it exists as a corporation, and must for all practical purposes be treated as a corporation, its existence is, if not illegal, at least illegitimate. Though individuals must ordinarily be treated as a corporation in all cases, and though even the state cannot deny its corporate existence in collateral proceedings, a corporation de facto may be dissolved and its corporate existence terminated by a direct proceeding brought against it by the state.

To create a de facto corporation there must be a law under which a de jure corporation could have been created,<sup>17</sup> a bona fide attempt to incorporate under the law, some compliance with it, and a subsequent user of corporate rights. If these things are done, a corporation de facto exists, even though all of the conditions required by law in order to form a de jure corporation have not been complied with.<sup>18</sup>

under the law. There being such an apparent attempt to perfect an organization, the failure as to some substantial requirement will prevent the body being a corporation de jure." *Finnegan v. Noerenberg*, 52 Minn. 239, 53 N. W. 1150, 18 L. R. A. 778, 38 Am. St. Rep. 552.

"Where there has been a substantial compliance with the law, the corporation is, of course, de jure." *Re GIBB'S ESTATE*, 157 Pa. 59, 27 Atl. 383, 22 L. R. A. 276, *Gillmore, Cas. Partnership*, 91. See "*Corporations*," *Dec. Dig. (Key No.)* §§ 25, 28; *Cent. Dig.* §§ 70, 71, 73-76; "*Partnership*," *Dec. Dig.* § 41; *Cent. Dig.* §§ 56, 58, 59.

<sup>17</sup> A few courts hold that an incorporation under an unconstitutional act creates a de facto corporation. *Richards v. Minnesota Savings Bank*, 75 Minn. 196, 77 N. W. 822; *City of St. Louis v. Shields*, 62 Mo. 247; *Lincoln Building & Savings Ass'n v. Graham*, 7 Neb. 173; *Coxe v. State*, 144 N. Y. 396, 39 N. E. 400. But the weight of authority and the better view seems to be that a de facto corporation cannot be created under an unconstitutional statute. *Doboy & Union Island Tel. Co. v. De Magathias (C. C.)* 25 Fed. 697; *Brandenstein v. Hoke*, 101 Cal. 131, 35 Pac. 562; *Georgia, S. & F. R. Co. v. Mercantile Trust & Deposit Co.*, 94 Ga. 306, 21 S. E. 701, 32 L. R. A. 208, 47 Am. St. Rep. 153; *Eaton v. Walker*, 76 Mich. 579, 43 N. W. 638, 6 L. R. A. 102. See "*Corporations*," *Dec. Dig. (Key No.)* §§ 25, 28; *Cent. Dig.* §§ 70, 71, 73-76; "*Partnership*," *Dec. Dig.* § 41; *Cent. Dig.* §§ 56, 58, 59.

<sup>18</sup> "Where the law authorizes a corporation, and there is an effort, in good faith, to organize a corporation under the law, and there-

*Pretended Incorporation*

If, however, a number of individuals pretend to be a corporation and to exercise corporate powers, without having even attempted to organize properly as a corporation, it is held that such pretended corporation has no legal existence at all.<sup>19</sup> Such organization can be attacked by an individual or the state, directly or collaterally, and the persons thus conducting business are liable as partners.<sup>20</sup>

*Liability of Stockholders in Defective Corporations, or Members of Associations Assuming to Act as Corporations*

One of the advantages to be derived from the privilege of doing business as a corporation is the limited liability of the stockholders. While in partnership each partner is liable to the full extent of all his separate property for the debts of the firm, a stockholder is usually not liable beyond the amount paid in for his stock. In order, however, to gain this advantage and others incident to incorporation, all the conditions prescribed by the law for the organization must be complied with. When there has been a substantial compliance with the law, and a corporation *de jure* has been found, no question as to the extent and manner of the stockholder's liability can arise. That has been determined by the Legislature. If persons have, however, failed to comply substantially with the law, and yet have assumed to act as a corporation, their liability may constitute a question

upon, as a result of such effort, corporate functions are assumed and exercised, the organization becomes a corporation *de facto*, and as a general rule the legal existence of such a corporation cannot be inquired into collaterally, although some of the required legal formalities have not been complied with. Ordinarily, such an inquiry can only be made in a direct proceeding, brought in the name of the state." Niblack, J., in *Hasselman v. United States Mortgage Co.*, 97 Ind. 305, 368. See "*Corporations*," *Dec. Dig. (Key No.)* § 29; *Cent. Dig.* §§ 77, 78.

<sup>19</sup> *Martin v. Deetz*, 102 Cal. 55, 36 Pac. 368, 41 Am. St. Rep. 151; *Journal Co. v. Nelson*, 133 Mo. App. 482, 113 S. W. 690; *Childs v. Hurd*, 32 W. Va. 66, 9 S. E. 362. See "*Corporations*," *Dec. Dig. (Key No.)* §§ 25, 28; *Cent. Dig.* §§ 70, 71, 73-76.

<sup>20</sup> *Fuller v. Rowe*, 57 N. Y. 23; *McLENNAN v. HOPKINS*, 2 Kan. App. 260, 41 Pac. 1061. See "*Corporations*," *Dec. Dig. (Key No.)* §§ 26, 29; *Cent. Dig.* §§ 77, 78; "*Partnership*," *Dec. Dig.* § 41; *Cent. Dig.* §§ 58, 59.

of much perplexity. On the one hand, it is said that they ought to be held to a partnership liability, that they have contracted for all of the benefits of partnership, that that is all that is necessary in order to create a partnership, and that in order to escape the liabilities of partnership they should be compelled to obey the requirements of the Legislature.<sup>21</sup> On the other hand, it is said that the parties never intended to form a partnership, that they never contracted as partners, and ought not to be held to a partnership liability.<sup>22</sup>

It seems to be true that in forming a corporation the members or stockholders do, in effect, contract for what in law constitutes a partnership, viz., the conduct of a common business with a view to mutual profit. We have seen that the relationship which the parties think they are assuming is immaterial. Therefore it seems that, so far as the intention of the parties is concerned, the stockholders of a defective corporation might well be held to a partnership liability. Still it should be recognized that creditors are really not injured by granting to stockholders in a defective corporation the limited liability attendant upon perfect incorporation, since such creditors usually deal with the stockholders on that basis. It is possible, therefore, that all stockholders in a defective corporation may be held liable as partners, unless it appears that public policy would be better served by holding them liable as stockholders. This seems to be the view of the courts, and, though there is much conflict in the cases, the conflict is due, mainly, to difference in policy rather than in principle.

The question may arise in different situations, varying from those where the law would not permit of the forma-

<sup>21</sup> BIGELOW v. GREGORY, 73 Ill. 197, Gilmore, Cas. Partnership, 104; Meinhard, Schaul & Co. v. Bedingfield Mercantile Co., 4 Ga. App. 176, 61 S. E. 34. See "Partnership," Dec. Dig. (Key No.) § 41; Cent. Dig. §§ 56, 58, 59; "Corporations," Cent. Dig. § 74.

<sup>22</sup> RUTHERFORD v. HILL, 22 Or. 218, 29 Pac. 546, 17 L. R. A. 549, 29 Am. St. Rep. 596, Gilmore, Cas. Partnership, 106; Owensboro Wagon Co. v. Bliss, 132 Ala. 253, 31 South. 81, 90 Am. St. Rep. 907. See "Partnership," Dec. Dig. (Key No.) §§ 17, 41; Cent. Dig. §§ 3, 56, 58, 59; "Corporations," Cent. Dig. § 74.

tion of a corporation to carry on the business actually carried on to the situation where a corporation might have been created, and was honestly attempted to be created, but there was an innocent failure to comply substantially with the law.

*No Law Permitting Incorporation*

General incorporation acts usually specify the particular businesses for which corporations may be formed under the act. A corporation formed for any other purpose exists without legislative sanction, and the members are usually held to a partnership liability.<sup>23</sup> Thus the members of a rifle club formed under a statute permitting incorporation for "literary, scientific, and charitable purposes" were held individually liable to the widow of a man killed by a bear kept by the club.<sup>24</sup>

If the act under which a corporation was organized is unconstitutional, the mere fact that an attempt was made in good faith to organize under it will not prevent the stockholders from being liable as partners.<sup>25</sup> And, though foreign corporations generally are permitted to transact business in each state, if their organization constitutes a fraud upon the laws of a state, the members will be held to a partnership liability.<sup>26</sup>

<sup>23</sup> *Mandeville v. Courtright*, 142 Fed. 97, 73 C. C. A. 321, 6 L. R. A. (N. S.) 1003. See "*Partnership*," *Dec. Dig. (Key No.)* § 41; *Cent. Dig.* §§ 56, 58, 59; "*Corporations*," *Cent. Dig.* § 74.

<sup>24</sup> *Vredenburg v. Behan*, 33 La. Ann. 627.

"The business conducted by the members of the organization was so entirely aside from the power conferred upon the grange by the statute under which the incorporation was effected that the business must be regarded as a partnership, and not corporate." *Henry v. Simanton*, 64 N. J. Eq. 572, 54 Atl. 153; *Wonderly v. Booth*, 36 N. J. Law, 250; *Re Mendenhall*, 9 Nat. Bankr. R. 497, Fed. Cas. No. 9,425; *Ridenour v. Mayo*, 40 Ohio St. 9; *Empire Mills v. Alston Grocery Co.* (Tex. App.) 15 S. W. 200. See "*Corporations*," *Dec. Dig. (Key No.)* § 14; *Cent. Dig.* § 16.

<sup>25</sup> *Brandenstein v. Hoke*, 101 Cal. 135, 35 Pac. 562; *Snyder v. Studebaker*, 19 Ind. 462, 81 Am. Dec. 415; *Eaton v. Walker*, 76 Mich. 579, 43 N. W. 638, 6 L. R. A. 102. But see *Richards v. Minnesota Savings Bank*, 75 Minn. 196, 77 N. W. 822. See "*Partnership*," *Dec. Dig. (Key No.)* § 41; *Cent. Dig.* §§ 56, 58, 59.

<sup>26</sup> *Montgomery v. Forbes*, 148 Mass. 249, 19 N. E. 342; *Hill v.*

*A Statute Authorizing Incorporation, but no Bona Fide Attempt to Organize under It*

Even if a statute exists which permits the organization of a corporation to conduct a particular business, those who wish to escape individual liability must at least make a bona fide attempt to organize under it. Unless they do so they will be held to have entered on the business as partners.<sup>27</sup>

*A Colorable Attempt to Organize under a Valid Existing Law and Subsequent User*

Although there is nothing inconsistent with the law of partnership in holding stockholders in a defective corporation liable as partners, and though it has been seen that in many cases they are so held, the present tendency and the weight of authority is in favor of holding stockholders in a de facto corporation to a corporate liability merely.<sup>28</sup> Corporations are recognized as beneficial to the state in the promotion of trade, and when the state has authorized the doing of a certain kind of business through a corporation it is recognized as unwise to discourage their organization by holding those who have in good faith attempted to or-

Beach, 12 N. J. Eq. 31; *Humphreys v. Mooney*, 5 Colo. 282; *Stafford Nat. Bank v. Palmer*, 47 Conn. 443. See "*Partnership*," *Dec. Dig. (Key No.)* § 41; *Cent. Dig.* §§ 56, 58, 59; "*Corporations*," *Cent. Dig.* §§ 74, 2547.

<sup>27</sup> *Harrill v. Davis*, 168 Fed. 187, 94 C. C. A. 47, 22 L. R. A. (N. S.) 1153; *Owen v. Shepard*, 59 Fed. 746, 8 C. C. A. 244; *Forbes v. Whittemore*, 62 Ark. 229, 35 S. W. 223; *Pettis v. Atkins*, 60 Ill. 454; *Sanders & Walker v. Herndon*, 128 Ky. 437, 108 S. W. 908, 32 Ky. Law Rep. 1362, rehearing denied 110 S. W. 862, 33 Ky. Law Rep. 669; *Fuller v. Rowe*, 57 N. Y. 23; *Worthington v. Griesser*, 77 App. Div. 203, 79 N. Y. Supp. 52; *Hyatt v. Van Riper*, 105 Mo. App. 664, 78 S. W. 1043; *McLENNAN v. HOPKINS*, 2 Kan. App. 260, 41 Pac. 1061; *Queen City Furniture & Carpet Co. v. Crawford*, 127 Mo. 356, 30 S. W. 163; *In re Browne & Jenkins Co.*, 106 La. 486, 31 South. 67. See "*Partnership*," *Dec. Dig. (Key No.)* §§ 41, 42; *Cent. Dig.* §§ 56-59; "*Corporations*," *Cent. Dig.* §§ 26, 74.

<sup>28</sup> "The test of a de facto corporation is this: Was there a law under which there might have been a de jure corporation of the kind, character, and class to which the organization in question apparently belongs?" *Toledo, St. L. & K. C. R. Co. v. Continental Trust Co.*, 95 Fed. 497, 508, 36 C. C. A. 155, 167. See "*Corporations*," *Dec. Dig. (Key No.)* § 28; *Cent. Dig.* § 70.

ganize one to a partnership liability.<sup>29</sup> There is much authority, however, for the view that all stockholders in defective corporations are liable as partners. It is said that they are claiming an exemption in derogation of common right, and must comply strictly with the statutory requirements in order to claim the exemption.<sup>30</sup> As stated before, the question resolves itself into one of public policy. The effect of holding members of de facto corporations as partners is to discourage attempts to organize corporations. The question is: Is it wise to do so, and thereby hold the members to a greater liability than they had intended in favor of those who would get all they expected to get when they contracted if they are held to a stockholder's liability? The tendency seems in favor of the position that it is for the

<sup>29</sup> *Whitney v. Wyman*, 101 U. S. 392, 25 L. Ed. 1050; *St. Louis & S. F. R. Co. v. Southwestern Telephone & Telegraph Co.*, 121 Fed. 276, 58 C. C. A. 198; *Owensboro Wagon Co. v. Bliss*, 132 Ala. 253, 31 South. 81, 90 Am. St. Rep. 907; *Bates v. Wilson*, 14 Colo. 140, 24 Pac. 99; *Butler Paper Co. v. Cleveland*, 220 Ill. 128, 77 N. E. 99, 110 Am. St. Rep. 230; *Love v. Ramsey*, 139 Mich. 47, 102 N. W. 279; *Brown v. Corbin*, 40 Minn. 508, 42 N. W. 481; *Central R. Co. of New Jersey v. Pennsylvania R. Co.*, 31 N. J. Eq. 475; *Vanneman v. Young*, 52 N. J. Law, 403, 20 Atl. 53; *People ex rel. New York, N. H. & H. R. Co. v. Board of R. Com'rs*, 81 App. Div. 242, 81 N. Y. Supp. 20, affirmed 175 N. Y. 516, 67 N. E. 1088; *Albright v. Lafayette Building & Savings Ass'n*, 102 Pa. 411, 423; *American Salt Co. v. Heidenheimer*, 80 Tex. 344, 15 S. W. 1038, 26 Am. St. Rep. 743; *Mitchell v. Jensen*, 29 Utah, 346, 81 Pac. 165. See "*Partnership*," *Dec. Dig. (Key No.)* §§ 41, 42; *Cent. Dig.* §§ 56-59; "*Corporations*," *Cent. Dig.* §§ 26, 74.

<sup>30</sup> "Our law furnishes so simple a method by which societies such as these may be incorporated and acquire the right to contract, \* \* \* and it is so easy for any one to know what is the truth of the case, that, if men will make business transactions of the character disclosed by this record, they must take the consequences." *Wilkins v. Wardens and Vestry of St. Mark's Protestant Episcopal Church of Dalton*, 52 Ga. 351, 353; *Forbes v. Whittemore*, 62 Ark. 229, 35 S. W. 223; *Loverin v. McLaughlin*, 161 Ill. 417, 44 N. E. 90; *Kaiser v. Lawrence Savings Bank*, 56 Iowa, 104, 8 N. W. 772, 41 Am. Rep. 85; *Sebastian v. Booneville Academy Co. (Ky.)* 56 S. W. 810; *Louisiana Nat. Bank v. Henderson*, 116 La. 413, 40 South. 779; *Smith v. Warden*, 86 Mo. 382. See "*Partnership*," *Dec. Dig. (Key No.)* §§ 41, 42; *Cent. Dig.* §§ 56-59; "*Corporations*," *Cent. Dig.* §§ 26, 74.

state only to question the corporate privileges and liabilities of a de facto corporation.<sup>31</sup>

### EXISTENCE OF PARTNERSHIP—NATURE OF QUESTION

19. Whether or not a partnership exists is ultimately a question of law, to be determined by the court after the facts have been established.

Whether or not a partnership exists is ultimately a question of law. After the facts are established, their legal effect is determined as a matter of law. It is customary, however, to say that the question of the existence of a partnership is a mixed question of law and fact.<sup>32</sup> Where all

<sup>31</sup> "Not infrequently the holding that the legal existence of a de facto corporation cannot be questioned by a private individual is referred to as being based on estoppel. This is not so, however, for the elements of estoppel are lacking. Moreover, if it were based on estoppel, those who had not dealt with the supposed corporation as a corporation could attack the validity of its existence; for they, at least, could not be said to be estopped. Besides, if those who have dealt with a de facto corporation were estopped to deny its corporate existence, those who have dealt with any association which, though not a de facto corporation, is assuming corporation's functions as a corporation, should be estopped. It has already been seen that they are not, however. The theory that a de facto corporation has no real existence, that it is a mere phantom, to be invoked only by that rule of estoppel which forbids a party who has dealt with a pretended corporation to deny its corporate existence, has no foundation, either in reason or authority. A de facto corporation is a reality. It has an actual and substantial legal existence. It is, as the term implies, a corporation." *Society Perun v. City of Cleveland*, 43 Ohio St. 481, 490, 3 N. E. 357, 360.

"This rule [concerning de facto corporations] is not founded upon any principle of estoppel, as is sometimes assumed, but upon the broader principles of common justice and public policy. It would be unjust and intolerable if, under such circumstance, every interloper and intruder were allowed thus to take advantage of every informality or irregularity of organization." *Mitchell, J., in East Norway Lake Church v. Froislie*, 37 Minn. 447, 451, 35 N. W. 260, 262. See "*Corporations*," *Dec. Dig. (Key No.)* §§ 28, 29; *Cent. Dig.* §§ 70, 77, 78.

<sup>32</sup> *Fox v. Clifton*, 9 Bing. 115, 117; *Gabriel v. Evill*, Car. & M. 358; *EVERITT v. OHAPMAN*, 6 Conn. 347, *Gilmore, Cas. Partner-*

the facts are admitted, it is for the court to say whether or not they constitute a partnership.<sup>33</sup> Thus the court must say whether a written agreement renders the parties to it partners.<sup>34</sup> But, where the facts are in dispute, the court will instruct the jury as to what facts will constitute a partnership, and it is for the jury to say whether or not the necessary facts exist;<sup>35</sup> or, if a special verdict is desired, the jury will determine what the facts really are, and the court will then determine whether or not such facts constitute a partnership.

### SAME—BURDEN OF PROOF

#### 20. The burden of proving the existence of a partnership is upon him who relies upon its existence.

The burden of proving a partnership is on him who relies upon its existence.<sup>36</sup> Thus where a suit was begun for the

ship, 68; *Beecham v. Dodd*, 3 Har. (Del.) 485; *Doggett v. Jordan*, 2 Fla. 541; *Drake v. Elwyn*, 1 Caines (N. Y.) 184; *Terrill v. Richards*, 1 Nott & McC. (S. C.) 20. See "*Partnership*," *Dec. Dig. (Key No.)* §§ 122, 218; *Cent. Dig.* §§ 185½, 427.

<sup>33</sup> *Morgan v. Farrel*, 58 Conn. 413, 20 Atl. 614, 18 Am. St. Rep. 282; *EVERITT v. CHAPMAN*, 6 Conn. 347, Gilmore, Cas. Partnership, 68; *Kingsbury v. Tharp*, 61 Mich. 216, 28 N. W. 74. See "*Partnership*," *Dec. Dig. (Key No.)* §§ 122, 218; *Cent. Dig.* §§ 185½, 427.

<sup>34</sup> *Boston & C. Smelting Co. v. Smith*, 13 R. I. 27, 43 Am. Rep. 3. See "*Partnership*," *Dec. Dig. (Key No.)* §§ 122, 218; *Cent. Dig.* §§ 40, 185½, 427.

<sup>35</sup> *McGrew v. Walker*, 17 Ala. 824; *Morgan v. Farrel*, 58 Conn. 413, 20 Atl. 614, 18 Am. St. Rep. 282; *EVERITT v. CHAPMAN*, 6 Conn. 347, Gilmore, Cas. Partnership, 68; *Kingsbury v. Tharp*, 61 Mich. 216, 28 N. W. 74; *Waggoner v. First Nat. Bank of Creighton*, 43 Neb. 84, 61 N. W. 112; *Dulany v. Elford*, 22 S. C. 308. See "*Partnership*," *Dec. Dig. (Key No.)* §§ 122, 218; *Cent. Dig.* §§ 185½, 186, 426, 427.

<sup>36</sup> *Woodward v. Sutton*, 1 Cranch, C. C. 351, Fed. Cas. No. 18,009; *Smith v. Moynihan*, 44 Cal. 53; *Hobson v. Porter*, 2 Colo. 28; *De St. Aubin v. Laskin*, 74 Ill. App. 455; *Henshaw v. Root*, 60 Ind. 220; *Byington v. Woodward*, 9 Iowa, 360; *Maunsell v. Willett*, 36 La. Ann. 322; *Howe v. Thayer*, 17 Pick. (Mass.) 91; *Campbell v. Sherman*, 49 Mich. 534, 14 N. W. 484; *Stickney v. Smith*, 5 Minn. 486 (Gil. 390); *Cook v. Martin*, 5 Smedes & M. (Miss.) 379; *Walga-*

pasturage of certain cows, and the defense was interposed that the plaintiff and defendant were partners and the cows were pastured under the partnership agreement, it was held that the burden of proving the partnership was on the defendant, the court saying: "It is not clear that the parties to this suit intended to form a partnership relation, and the burden of proving that relation was on the party asserting its existence."<sup>27</sup> And where, in an action for goods sold to a partnership, the defendant admitted that he was a member of a partnership of the same name as that to which the goods were alleged to have been sold, but contended that there were two partnerships of the same name, and that he was not a member of the one which bought the goods, it was held that the burden of proving that defendant was a member of the partnership which bought the goods was on the plaintiff.<sup>28</sup> If a partnership is proved to have once existed, however, its continued existence is presumed. To escape liability in such a case the one alleging the termination must prove that fact, and also that proper notice, where necessary, was given to the one seeking to establish a partnership liability.<sup>29</sup>

mood v. Randolph, 22 Neb. 493, 35 N. W. 217; Kelly v. Devlin, 47 N. Y. Super. Ct. 555; Clark v. Kensell, Wright (Ohio) 480; Strickler v. Gitchel, 14 Okl. 523, 78 Pac. 94; Ashley v. Williams, 17 Or. 441; 21 Pac. 556; Hallstead v. Coleman, 143 Pa. 353, 22 Atl. 977, 13 L. R. A. 370; State v. Penman, 2 Desaus. (S. C.) 1; Clifton & Wadkins v. Royse Cotton Oil Co., 39 Tex. Civ. App. 188, 87 S. W. 182. See "Partnership," Dec. Dig. (Key No.) § 44; Cent. Dig. §§ 61-63.

<sup>27</sup> Briggs v. Kohl, 132 Ill. App. 484. See "Partnership," Dec. Dig. (Key No.) § 44; Cent. Dig. §§ 61-63.

<sup>28</sup> Bristol & Sweet Co. v. Skapple, 17 N. D. 271, 115 N. W. 841. See "Partnership," Dec. Dig. (Key No.) § 44; Cent. Dig. §§ 61-63.

<sup>29</sup> Lieb v. Craddock, 87 Ky. 525, 9 S. W. 838; Dunham v. Loverock, 158 Pa. 197, 27 Atl. 990, 38 Am. St. Rep. 838. See "Partnership," Dec. Dig. (Key No.) § 259; Cent. Dig. § 599.

### PARTNERSHIP BY ESTOPPEL

21. One who represents himself to be a partner, or who knows and assents to such a representation by another, is liable, by the doctrine of estoppel, as a partner to all persons who, knowing of the representation, rely upon the same.

#### *Estoppel—In General*

One is said to be estopped when he is not permitted to tell the truth. He is not permitted to tell the truth, because he has at some other time told the contrary, either by words or conduct, under such circumstances that it would, in the view of the courts, be unjust to permit him now to tell the truth and to rely upon it.

The principal circumstances usually considered as essential in creating an estoppel are: A misrepresentation of some material question of fact or law, made mediately or immediately to the one in whose favor the estoppel is asserted, under such circumstances that it might reasonably be expected that he who asserts the estoppel would act upon it, and upon the faith of which he did act, so that it would injure him to permit the truth to be established.<sup>40</sup>

#### *Holding Out by Defendant*

Partnership by estoppel exists only where the parties have not agreed to be and are not partners in fact. They are held as partners only because they have represented themselves to be such, and in consequence it would be unjust to a third person, who has relied on such representations, to permit them to show that they are not in fact partners.<sup>41</sup> It may be, however, that the partnership created by estoppel does not in any way resemble true partnership even as to third persons, for one who represents another as his partner may be held liable as a partner for the acts

<sup>40</sup> Ewart on Estoppel, p. 72.

<sup>41</sup> Gershner v. Scott-Mayer Commission Co. (Ark.) 124 S. W. 772; Meinhard, Schaul & Co. v. Bedingfield Mercantile Co., 4 Ga. App. 176, 61 S. E. 34. See "Partnership," Dec. Dig. (Key No.) §§ 33-38; Cent. Dig. §§ 49-53.

of such other without the other incurring any partnership liability at all.<sup>42</sup> One may estop himself to deny that he is a partner by a direct assertion that he is one, or by conduct which would reasonably entitle one to believe him to be one. The responsibility for the belief existing in the plaintiff's mind must be brought home to the defendant. For instance, a decedent's estate is not liable on the representations of the survivors that the partnership still continued.<sup>43</sup> The estoppel is founded upon equitable principles and cannot be asserted against innocent parties.

*Liability by Being Held Out by Others*

It is plainly just that one who has held himself out as a partner should be held liable to those who have acted on such representation. The cases where such holding out has been shown are clear. The rule is the same where such holding out has been authorized by the defendant; for what is done by his authority is, in law, done by himself. Such authority may be shown by conduct as well as by words.

Where, however, no authority can be shown, the question is more perplexing. One cannot be held for that for which he is in no way responsible. Hence, if one is held out as a partner without his knowledge, he cannot be estopped to deny the partnership, even as against those who relied on the representation.<sup>44</sup> But the rule has been laid down that "if one is held out as a partner, and he knows it, he is chargeable as one, unless he does all that a reasonable and honest man should do under similar circumstances to assert and manifest his refusal, and thereby prevent innocent parties from being misled."<sup>45</sup> This rule makes it nec-

<sup>42</sup> *Hess v. Ferris*, 57 Ill. App. 37; *Mechem on Partnership*, § 73. See "*Partnership*," *Dec. Dig. (Key No.)* §§ 33-38; *Cent. Dig.* §§ 49-53.

<sup>43</sup> *Webster v. Webster*, 3 Swanst. 490; *Vulliamy v. Noble*, 3 Mer. 503, 614. See "*Partnership*," *Dec. Dig. (Key No.)* §§ 33-38; *Cent. Dig.* §§ 49-53.

<sup>44</sup> *Campbell v. Hastings*, 29 Ark. 512; *Butler v. Hinckley*, 17 Colo. 523, 30 Pac. 250; *Bishop v. Georgeson*, 60 Ill. 484; *Sheldon v. Bigelow*, 118 Iowa, 586, 92 N. W. 701; *Bery v. Callahan*, 15 Ky. Law Rep. 539; *Crook v. Davis*, 28 Mo. 94; *Cole v. Butler*, 24 Mo. App. 76; *Seabury & Johnson v. Bolles*, 51 N. J. Law, 103, 16 Atl. 54, 11 L. R. A. 136. See "*Partnership*," *Dec. Dig. (Key No.)* § 36; *Cent. Dig.* § 51.

<sup>45</sup> *T. Parsons on Partnership*, 134.

essary for one who has knowledge only that he is being held out as a partner to deny the truth of the representation. It in effect makes him chargeable, not only for his own conduct, but for the conduct of others. It apparently invests him with the guardianship of his own name and credit, and charges him with liability for their misuse in the hands of others. It is submitted that the rule as stated is too broad, and that one is not liable as a partner to third persons unless a jury would be justified in finding, not only that he knew that he was being held out as a partner, but that he assented to being so held out. Even in a case where the rule above stated was adopted, it was stated that evidence existed from which the jury would be justified in finding that the defendant knew of and assented to his being held out as a partner.<sup>46</sup> In another case it was said: "The court instructed the jury as follows: 'If you find that Mrs. Rutherford knew that her name had been mentioned in a commercial newspaper as associated with Mr. Beckwith, and composing the partnership of Charles M. Beckwith & Co., it was her duty, if she was not such partner, to see that a denial of such copartnership was promptly made, in unmistakable terms, and as full as the publication of the partnership had been made. Failing to do this, she will be held to have acquiesced in such publication, and would be estopped from denying the existence of such copartnership as against the plaintiff, provided he gave the firm of Charles M. Beckwith & Co. the credit of the liability in question in reliance upon the alleged facts of such holding out, and failure on the part of defendant Rutherford to publicly deny the same.' The instruction was erroneous. Mrs. Rutherford was under no legal or moral obligation to publish a denial of this newspaper story. Any one who saw fit to deal with Mr. Beckwith, relying on this item, did so at his peril. If she had been shown the article, had assented to it, and credit had been given her on the strength of such assent, the rule of estoppel would have applied. There be-

<sup>46</sup> *FLETCHER v. PULLEN*, 70 Md. 205, 16 Atl. 887, 14 Am. St. Rep. 355, Gllmore, Cas. Partnership, 100. See "*Partnership*," *Dec. Dig. (Key No.)* §§ 36, 56; *Cent. Dig.* §§ 51, 80.

ing no evidence that she authorized or assented to it, there is no room for the application of the rule." <sup>47</sup>

*Knowledge of the Plaintiff*

Not only must responsibility for the representation be fastened upon the defendant, but it must be shown that the plaintiff knew of the representation. "A person who is not in fact a partner, who has no interest in the business of the partnership, and does not share in its profits, and is sought to be charged for its debts because of having held himself out, or permitted himself to be held out, as a partner, cannot be made liable upon contracts of the partnership, except with those who have contracted with the partnership upon the faith of such holding out. In such a case, the only ground of charging him as a partner is that by his conduct in holding himself out as a partner he has induced persons dealing with the partnership to believe him to be a partner, and, by reason of such belief, to give credit to the partnership. As his liability rests solely upon the ground that he cannot be permitted to deny a participation which, though not existing in fact, he has asserted, or permitted to appear to exist, there is no reason why a creditor of the partnership, who has neither known of nor acted upon the assertion or permission, should hold as a partner one who never was in fact, and whom he never understood or supposed to be, a partner, at the time of dealing with and giving credit to the partnership." <sup>48</sup>

<sup>47</sup> Grant, C. J., in *Munton v. Rutherford*, 121 Mich. 418, 80 N. W. 112; *Rittenhouse v. Leigh*, 57 Miss. 697. "The holding one's self out to the world as a partner, as contradistinguished from the actual relation of partnership, imports at least the voluntary act of the party so holding himself out. It implies the lending of his name to the partnership, and is altogether incompatible with the want of knowledge that his name has been so used. Thus, in the ordinary instances of its occurrence, where a person allows his name to remain in a firm, either exposed to the public over a shop door, or to be used in printed invoices or bills of parcels, or to be published in advertisements, the knowledge of the party that his name is used and his assent thereto is the very ground upon which he is estopped from disputing his liability as a partner." Tindal, C. J., in *Fox v. Clifton*, 8 L. J. C. P. 257. See "*Partnership*," *Dec. Dig. (Key No.)* § 36; *Cent. Dig.* § 51.

<sup>48</sup> Gray, J., in *THOMPSON et al. v. FIRST NAT. BANK OF*

It has been said, however, that, although the plaintiff did not know of defendant's representation of partnership, he may nevertheless recover. "The whole foundation of the theory that a person who, not being in fact a partner, has held himself out as a partner, may be liable as such to a creditor of the partnership who had no knowledge of the holding out, and who never gave credit to him or to the partnership by reason of supposing him to be a member of it, is a statement attributed to Lord Mansfield in a note of a trial before him at nisi prius in 1784,<sup>49</sup> as cited by counsel in a case in which it was sought to charge as a partner one who had shared in the profits of a partnership. By so much of that note as was thus cited, which is the only report of the case that has come down to us, it would appear that in an action by Young, a coal merchant, against Mrs. Axtell and another person, to recover for coals sold and delivered, the plaintiff introduced evidence that Mrs. Axtell had lately carried on the coal trade, and that the other defendant did the same under an agreement between them by which she was to bring what customers she could into the business, and the other defendant was to pay her an annuity, and also two shillings for every chaldron that should be sold to those persons who had been her customers or were of her recommending, and that bills were made out in their joint names for goods sold to her customers, and that the jury found a verdict against Mrs. Axtell, after being instructed by Lord Mansfield that 'he should have rather thought, on the agreement only, that Mrs. Axtell would be liable, not on account of the annuity, but the other payment, as that would be increased in proportion as she increased the business. However, as she suffered her name to be used in the business, and held herself out as a partner, she was cer-

TOLEDO, 111 U. S. 529, 536, 4 Sup. Ct. 689, 28 L. Ed. 507, Gilmore, *Cas. Partnership*, 96; Spaulding v. Nathan, 21 Ind. App. 122, 51 N. E. 742; Daniel v. Schultz, 12 Ky. Law Rep. 987; Adrian Knitting Co. v. Wabash R. Co., 145 Mich. 323, 108 N. W. 706. See "*Partnership*," *Dec. Dig. (Key No.)* § 37; *Cent. Dig.* §§ 37, 52.

<sup>49</sup> Young v. Axtell, cited in WAUGH v. CARVER, 2 H. Bl. 235, 242, Gilmore, *Cas. Partnership*, 19. See "*Partnership*," *Dec. Dig. (Key No.)* § 37; *Cent. Dig.* §§ 37, 52.

tainly liable, though the plaintiff did not, at the time of dealing, know that she was a partner, or that her name was used.' \* \* \* But as the case was not there cited upon the question of liability by being held out as a partner, it is by no means certain that we have a full and accurate report of what was said by Lord Mansfield upon that question; still less that he intended to lay down a general rule, including cases in which one, who in fact had never taken any part in or received any profits from the business, held himself out as a partner."<sup>50</sup>

The great weight of authority accords with the view that, in order to succeed on the grounds of estoppel, the plaintiff must show that he personally was aware of defendant's representation.<sup>51</sup>

<sup>50</sup> Gray, J., in *THOMPSON v. FIRST NATIONAL BANK OF TOLEDO*, 111 U. S. 529, 4 Sup. Ct. 689, 28 L. Ed. 507, Gilmore, Cas. Partnership, 96. See "*Partnership*," *Dec. Dig. (Key No.)* § 37; *Cent. Dig.* §§ 37, 52.

<sup>51</sup> *McIver v. Humble*, 18 East, 169; *Ford v. Whitmarsh*, *Hurlstone & Walmsley*, 53; *Pott v. Eyton*, 3 C. B. 32; *Martyn v. Gray*, 14 C. B. N. S. 824; *Edmundson v. Thompson*, 31 L. J. N. S. 207; *Benedict v. Davis*, 2 McLean, 347, Fed. Cas. No. 1,293; *Hefner v. Palmer*, 67 Ill. 161; *Uhl v. Harvey*, 78 Ind. 26; *SHERROD v. LANGDON*, 21 Iowa, 518; *Sheldon v. Bigelow*, 118 Iowa, 586, 92 N. W. 701; *Wood v. Pennell*, 51 Me. 52; *Fitch v. Harrington*, 13 Gray (Mass.) 469, 74 Am. Dec. 641; *Cook v. Penrhyn Slate Co.*, 36 Ohio St. 135, 38 Am. Rep. 568; *Kirk v. Hartman*, 63 Pa. 97; *Hicks v. Cram*, 17 Vt. 449.

Contra: *POILLON v. SECOR*, 61 N. Y. 456. This case adopted the following rule laid down in *Parsons on Partnership*: "Where one is held forth to the world as a partner, the first question is: Was he so held out by his own authority, assent or connivance, or by his negligence? If by his authority, consent or connivance, the presumption is absolute that he was so held out to every creditor or customer. If so held out by his own negligence only, he should be held only to a creditor who had been actually misled thereby." *Parsons on Partnership* (3d Ed.) 130. This rule was omitted in the later editions, and the statement was made that the decision adopting it was erroneous. *Parsons on Partnership* (4th Ed.) 104, note 2. The case itself must be considered as overruled by the subsequent cases of *Central City Savings Bank v. Walker*, 66 N. Y. 424; *Cassidy v. Hall*, 97 N. Y. 159; *Rogers v. Murray*, 110 N. Y. 658, 18 N. E. 261. See "*Partnership*," *Dec. Dig. (Key No.)* §§ 37, 44; *Cent. Dig.* §§ 37, 52, 61-63.

*Reliance by the Plaintiff*

It is not only necessary for the creditor to show that he knew of the representations made or permitted by the defendant, but that he believed them and relied upon them.<sup>52</sup> Thus, while one might hold an actual partner of whose existence he was unaware at the time he made the contract sued upon, if he subsequently discovered it, he can hold by estoppel only those upon whose credit he at the time relied; also, even though he has been told that a certain person was a partner in a certain firm, he cannot hold him if the statement has been subsequently denied by the reputed partner;<sup>53</sup> nor can he hold him if by the exercise of due diligence he might have learned the truth.<sup>54</sup>

Though the plaintiff must have believed and had reason to believe that the defendant was a partner,<sup>55</sup> it is not nec-

<sup>52</sup> *Herman Kahn Co. v. A. T. Bowden & Co.*, 80 Ark. 23, 96 S. W. 126; *James Reilly Repair & Supply Co. v. Gallagher* (Sup.) 108 N. Y. Supp. 655; *Mims v. Brook & Co.*, 3 Ga. App. 247, 59 S. E. 711; *Breinig v. Sparrow*, 39 Ind. App. 455, 80 N. E. 37. See "*Partnership*," *Dec. Dig. (Key No.)* § 37; *Cent. Dig.* §§ 37, 52.

<sup>53</sup> *McClellan v. Clark*, 20 Ont. App. 660; *Krans v. Luthy*, 56 Ill. App. 506; *Rittenhouse v. Leigh*, 57 Miss. 697.

"The ground of liability of a person as partner who is not so in fact is that he has held himself out to the world as such, or has permitted others to do so, and by reason thereof is estopped from denying that he is one, as against those who have in good faith dealt with the firm, or with him as a member of it. But it must appear that the person dealing with the firm believed, and had a reasonable right to believe, that the party he seeks to hold as a partner was a member of the firm, and that the credit was to some extent induced by this belief. It must also appear that the holding out was by the party sought to be charged, or by his authority, or with his knowledge or assent. This, where it is not the direct act of the party, may be inferred from circumstances, such as from advertisements, shop bills, signs, or cards, and from various other acts from which it is reasonable to infer that the holding out was with his authority, knowledge or assent." *FLETCHER v. PULLEN*, 70 Md. 205, 16 Atl. 887, 14 Am. St. Rep. 355, Gilmore, Cas. Partnership, 100; *Rives v. Michaels*, 16 Misc. Rep. 57, 37 N. Y. Supp. 644. See "*Partnership*," *Dec. Dig. (Key No.)* § 37; *Cent. Dig.* §§ 37, 52.

<sup>54</sup> *Morgan v. Ferrel*, 58 Conn. 413, 20 Atl. 614, 18 Am. St. Rep. 282. See "*Partnership*," *Dec. Dig. (Key No.)* § 37; *Cent. Dig.* §§ 37, 50, 52.

<sup>55</sup> *Fisher v. A. Y. McDonald Co.*, 85 Ill. App. 653. See "*Partnership*," *Dec. Dig. (Key No.)* § 37; *Cent. Dig.* §§ 37, 52.

essary for him to show that he relied solely on the credit of the defendant. It is sufficient to charge the defendant if he gave credit to a firm of which he believed him to be a partner. Thus it is not necessary for the plaintiff to show that the defendant was a man of financial ability.<sup>56</sup> Nor need he be able to swear that had defendant not been a partner he would not have sold the goods to the firm.<sup>57</sup>

#### *Nature of Question*

Whether or not defendant has held himself out to the defendant as a partner is a question of fact.<sup>58</sup> Hence it is possible for the same holding out to be regarded as sufficient in one case to establish liability and insufficient in another. This result was actually reached in two English cases.<sup>59</sup> The same representations were relied upon as constituting a holding out in each case. Similar instructions were given to the jury in each case; they being instructed that they must hold the defendant liable if they find a holding out. In one case a verdict was returned for the plaintiff, in the other for the defendant, and in each case the court refused to disturb the verdict.

<sup>56</sup> *Strecker v. Conn*, 90 Ind. 469. See "*Partnership*," *Dec. Dig. (Key No.)* § 34; *Cent. Dig.* § 49.

<sup>57</sup> *Lieb v. Craddock*, 87 Ky. 525, 9 S. W. 838. See "*Partnership*," *Dec. Dig. (Key No.)* §§ 37, 241; *Cent. Dig.* §§ 37, 52, 479½, 480.

<sup>58</sup> *Wood v. The Duke of Argyll*, 6 Man. & Gr. 928; *Lake v. The Duke of Argyll*, 6 Q. B. 477; *FLETCHER v. PULLEN*, 70 Md. 205, 16 Atl. 887, 14 Am. St. Rep. 355, *Gillmore, Cas. Partnership*, 100; *Seabury & Johnson v. Bolles*, 51 N. J. Law, 103, 16 Atl. 54, 11 L. R. A. 136. See "*Partnership*," *Dec. Dig. (Key No.)* §§ 122, 218; *Cent. Dig.* §§ 185½, 427.

<sup>59</sup> *Wood v. The Duke of Argyll*, 6 Man. & Gr. 928; *Lake v. The Duke of Argyll*, 6 Q. B. 477. See "*Partnership*," *Dec. Dig. (Key No.)* §§ 33-38, 122, 218; *Cent. Dig.* §§ 49-53, 185½, 427.

## CHAPTER II

### FORMATION AND CLASSIFICATION OF PARTNERSHIPS

- 22. Partnership Arises from a Contract.
- 23. Requirements of the Contract.
- 24. Competency of the Parties.
- 25. Consideration.
- 26. Formalities.
- 27-28. Statute of Frauds.
- 29. Subject-Matter.
- 30. Legality of Object.
- 31. Classification of Partnerships.
- 32. Ordinary Partnerships—Universal, General, Special, or Particular.
- 33. Limited Partnerships.
- 34. Joint-Stock Companies.
- 35. Subpartnerships.
- 36. Mining Partnerships.
- 37-38. Trading and Nontrading Partnerships.
- 39. Classification of Partners.

### PARTNERSHIP ARISES FROM A CONTRACT

22. Partnership is a relation which results only from a contract between the parties; it is never created by operation of law. Being a relation based upon mutual trust and confidence, it can only exist where the parties have voluntarily created it. This gives rise to the principle of *delectus personarum*, or right of selection, which requires that every member to the relation consent to its formation and continuance.

#### *Partnership Created Only by Contract*

Since partnership is the relation existing between persons who have so agreed that the profits of a business carried on by one or more for all inure to them all as co-owners, it necessarily follows that a partnership can be created only by contract, either express or implied. In the absence of such an agreement, a true partnership is never created by

operation of law.<sup>1</sup> Thus where sons assisted their father for many years in carrying on business, although the former received no compensation and regarded themselves as having an interest in the business, it was held that no partnership existed, for there was no agreement to form the relation, and the law will not "surprise them into a partnership of which they never dreamed." The most that the sons had was an expectation of ultimate succession to the business.<sup>2</sup> So a mere agreement between two commercial houses to share commissions in sales of goods forwarded by one to the other does not constitute a partnership.<sup>3</sup> So, also, where a broker purchased a quantity of tea for several persons, who were to have separate shares therein, such persons were held not to be partners with the broker and one another, because they "had never met or contracted

<sup>1</sup> *North Pac. Lumber Co. v. Spore*, 44 Or. 462, 75 Pac. 890; *Reynolds v. Radke*, 112 Ill. App. 575; *Wilson's Ex'rs v. Cobb's Ex'rs*, 28 N. J. Eq. 177, 179, where, in holding that joint prosecution of a lawsuit does not create a partnership, the court said: "There is no such thing as a partnership by implication or operation of law. The relation inter sese is founded in voluntary contract, and cannot exist independent of it."

A partnership is not established by the mere fact that parties purchase property jointly. *Ingals v. Ferguson*, 59 Mo. App. 299. See "*Partnership*," *Dec. Dig. (Key No.)* §§ 18, 20-22, 28-32; *Cent. Dig.* §§ 1, 4-8, 30-48.

<sup>2</sup> *PHILLIPS v. PHILLIPS*, 49 Ill. 437, *Gilmore, Cas. Partnership*, 113. "The intention or even belief of one party alone cannot create a partnership without the assent of the others." *Id.* But see *Ratzer v. Ratzer*, 28 N. J. Eq. 136, where a partnership was declared to exist on similar facts. See "*Partnership*," *Dec. Dig. (Key No.)* § 18; *Cent. Dig.* § 4.

<sup>3</sup> *Pomeroy v. Sigerson*, 22 Mo. 177; *FECHTELER et al. v. PALM BROS. & CO.*, 133 Fed. 462, 66 C. C. A. 336, *Gilmore, Cas. Partnership*, 76; *SABEL et al. v. SAVANNAH RAIL & EQUIPMENT CO.*, 135 Ala. 380, 33 South. 663 (1903) *Gilmore, Cas. Partnership*, 116; *In re Winter's Estate*, *Myr. Prob. (Cal.)* 131, where persons living together as husband and wife accumulate property, on the death of the man the woman was held not entitled to the property as surviving partner, as against a former wife. But where the wife invests community property in a partnership business, the husband becomes a partner. *Houghton v. Puryear*, 10 Tex. Civ. App. 383, 30 S. W. 583. See "*Partnership*," *Dec. Dig. (Key No.)* §§ 4-13, 28-32; *Cent. Dig.* §§ 15-28, 30-35, 38-48.

together as partners."<sup>4</sup> Again, where the plaintiff furnished the master of a vessel with money with which to purchase goods to be taken on a voyage and sold and the profits to be divided, they were not partners, for "it was only an agreement for so much as a compensation for the plaintiff's trouble, and for lending the master his credit."<sup>5</sup> This rule, that all the parties to the relation must have voluntarily assented thereto, originated in the Roman law, was incorporated in the law merchant, and became an integral part of the common law. As explained elsewhere,<sup>6</sup> an anomalous exception to the rule was established, called partnership as to third persons, by reason of participation in the profits of a business, whereby persons not really partners as between themselves were held liable as partners to third persons dealing with them. This exception was abandoned in England, where it originated, and was either never adopted by American courts, or, if adopted, was discarded save in a few jurisdictions.<sup>7</sup> Where the relation exists, it usually does so as the result of an express or implied agreement to form a partnership. It is not necessary that any particular words be used in the contract, nor that the parties specifically designate their agreement as one of partnership. It is sufficient if the agreement is to do such acts as the law regards as amounting to partnership.<sup>8</sup>

*Delectus Personarum.*

The requirement of a contract for the creation of a partnership is founded upon the principle of *delectus personarum*.

<sup>4</sup> *HOARE v. DAWES*, 1 Doug. 371, Gilmore, Cas. Partnership, 1. See "*Partnership*," Dec. Dig. (Key No.) §§ 18, 20-22; Cent. Dig. §§ 1, 4, 6-8.

<sup>5</sup> *HESKETH v. BLANCHARD*, 4 East, 144, Gilmore, Cas. Partnership, 2. See "*Partnership*," Dec. Dig. (Key No.) §§ 9, 30; Cent. Dig. §§ 23, 24, 43, 44.

<sup>6</sup> Chapter I, ante, "*Partnership as to Third Persons*," §§ 4-7, pp. 10-24.

<sup>7</sup> *COX v. HICKMAN*, 8 H. L. Cas. 268, Gilmore, Cas. Partnership, 31; *BEECHER v. BUSH*, 45 Mich. 188, 7 N. W. 785, 40 Am. Rep. 465, Gilmore, Cas. Partnership, 49. See "*Partnership*," Dec. Dig. (Key No.) § 30; Cent. Dig. §§ 38-48.

<sup>8</sup> *Beecher v. Bush*, supra; *Spaulding v. Stubbings*, 86 Wis. 255, 56 N. W. 469, 39 Am. St. Rep. 888; *Coons v. Coons*, 106 Va. 572, 56

arum, or right of selection, and this in turn grows out of the nature and consequences of the relation. "When a man enters into a partnership, he certainly commits his dearest rights to the discretion of every one who forms a part of that partnership." "It is an imprudent thing for a man to enter into partnership with any person, unless he has the most implicit confidence in his integrity."<sup>9</sup> Within the scope of the partnership one partner may bind his copartners by his contracts and acts, may pledge their credit and may convey a perfect title to the firm chattels. The property or money which one puts into a partnership venture ceases to be his exclusively and comes under the control and disposition of his copartners. Because of the powers of partners to subject one another to liability and to deal with common property, and because of the mutual confidence and trust required in the relation, this right of selection of one's associates is a fundamental principle, not only in the establishing, but also in the continuance, of the relation. It therefore follows that no person can be introduced as a partner without the consent of himself and of all those who for the time being are members of the firm.<sup>10</sup> If a partner does assign his interest in the firm, his assignee does not become a member of the partnership, but acquires merely a right to insist upon an accounting from the firm, and to have whatever his assignor would be entitled to upon a settlement of the partnership affairs. Thus the purchaser of the interest of a deceased partner, or of the interest of a partner sold on execution, does not become a member of the firm.<sup>11</sup> Likewise, if a partner by will leaves his

S. E. 576. See "*Partnership*," *Dec. Dig. (Key No.)* §§ 20-22, 23-32; *Cent. Dig.* §§ 1, 6-8, 30-35, 38-48.

<sup>9</sup> Wells v. Masterman, 2 Esp. 731; Baker v. Charlton, 1 Peake, 80. See "*Partnership*," *Dec. Dig. (Key No.)* §§ 1, 18; *Cent. Dig.* § 4.

<sup>10</sup> Morrison v. Austin State Bank, 213 Ill. 472, 72 N. E. 1109, 104 Am. St. Rep. 225; Gray v. Gibson, 6 Mich. 300; McNamara v. Gaylord, 1 Bond, 302, Fed. Cas. No. 8,910; Freligh v. Miller, 16 La. Ann. 418; Freeman v. Bloomfield, 43 Mo. 391; Filley v. Walker, 28 Neb. 506, 44 N. W. 737; Marquand v. New York Mfg. Co., 17 Johns. (N. Y.) 529, 535. See "*Partnership*," *Dec. Dig. (Key No.)* § 227; *Cent. Dig.* § 475.

<sup>11</sup> Noonan v. Nunan, 76 Cal. 44, 18 Pac. 98; Carter v. Roland, 53

interest in the firm to his executors or to a legatee, this does not make the executor or the legatee a partner, although the devise was for the express purpose of accomplishing such a result.<sup>12</sup>

#### *Apparent Exceptions*

Partners may, however, agree at the outset in the partnership contract to accept the assignee of a partner's interest as a member of the firm, and if such assignee elects to become a partner by virtue of the assignment he will then take on all the rights and liabilities of a member of the relation. Under such an arrangement the old partnership is said to continue. In reality, the old firm is at an end, and a new partnership of the continuing member and the assignee is created.<sup>13</sup> The partnership articles may also pro-

Tex. 540; *Nicoll v. Mumford*, 4 Johns. Ch. (N. Y.) 522; *Kingman v. Spurr*, 7 Pick. (Mass.) 235; *Moddewell v. Keever*, 8 Watta. & S. (Pa.) 63. See "Partnership," *Dec. Dig. (Key No.)* § 227; *Cent. Dig.* §§ 143, 473-475.

<sup>12</sup> *PEARCE v. CHAMBERLAIN*, 2 Ves. 33, Gilmore, Cas. Partnership, 592; *Wilson v. Greenwood*, 1 Swanst. 471; *FOX v. HANBURY*, Cowp. 445; *WILD v. DAVENPORT*, 48 N. J. Law, 129, 7 Atl. 295, 57 Am. Rep. 552. See "Partnership," *Dec. Dig. (Key No.)* § 255; *Cent. Dig.* §§ 552-561.

<sup>13</sup> "As a partner cannot possibly continue to be a member of a firm after his death, any agreement with his executor, or other person having a beneficial interest in the share of the assets which belonged to him, for the continuation of the business thereafter with the surviving partner, is, necessarily, the formation of another partnership, the terms of which, when not otherwise expressly agreed upon, may be implied, from the manner of conducting the business, to be the same as those of the former partnership. 'What is inaccurately called provision against the dissolution of the partnership is an agreement that, if either party dies, his property shall remain in the firm and in the business, or that his executors shall carry on the business, for the benefit of his children, or that his children, or some one of them, or some other person, shall, immediately on his death, take his place in the firm, and become a partner in his stead. All these agreements and arrangements, and all that can be made for a similar purpose, are, in fact, only bargains for the creation of a new partnership when the old one ceases to exist. And so, too, all arrangements or contracts which may be made between the surviving partners and the representatives or appointee of the deceased have for their effect only the formation of a new partnership, which, upon some terms or other, takes the

vide that on the death of one partner the surviving partners will continue the business and accept into the firm the representative of the deceased member. If the representative elects to come in, but not otherwise, the partnership will continue.<sup>14</sup> Although there be no agreement in advance for substitution of members, an implied assent may be found in the actual acceptance of a partner's assignee. The new partner becomes such, however, by reason of the acceptance of the other partners and his agreement with them, and not by reason of the assignment or transfer of the one who has ceased to be a partner.<sup>15</sup>

Nor does the principle of *delectus personarum* prohibit

stock, and carries on the business of the old one.' Parsons on Partnership, § 343. The effect cannot be otherwise of any arrangement for a continuation of the business, between the surviving member of the firm and the executor or other appointee under the will of the deceased member, made in pursuance of the will; for, upon the death of the partner, his personal estate, including his interest in the partnership, devolves upon his executor, and vests in the beneficiaries of the will, and becomes their property." Per Williams, J., in *McGrath v. Cowen*, 57 Ohio St. 385, 401, 49 N. E. 338, 340 (1898). See "*Partnership*," *Dec. Dig. (Key No.)* §§ 227, 255; *Cent. Dig.* §§ 143, 473-475, 552-561.

<sup>14</sup> *Ex parte Garland*, 10 Ves. 110, 119; *Warner v. Cunningham*, 3 Dow. 76.

In *WILD v. DAVENPORT*, 48 N. J. Law, 129, 136, 7 Atl. 295, 299, 57 Am. Rep. 552 (1886), it is said: "A provision in articles of partnership that on the death of a partner his executor, or personal representative, or some other person, shall be entitled to the place of a deceased partner in the firm, with the capital of the deceased in the firm business, or some part of it, is binding upon the surviving partner to admit the executor, personal representative, or nominee of the deceased partner, but does not bind the latter to come in. They have an option to come in or not, and a reasonable time within which to elect." See "*Partnership*," *Dec. Dig. (Key No.)* § 255; *Cent. Dig.* §§ 552-561.

<sup>15</sup> *Meaher v. Cox*, 37 Ala. 201; *Rosenstiel v. Gray*, 112 Ill. 282. In the absence of any new stipulations, the acceptance of a partner's assignee is only for the conduct of the business according to the terms and conditions of the original articles. *Love v. Payne*, 73 Ind. 80, 38 Am. Rep. 111. Silence or failure to dissent from an assignment by one partner purporting to substitute his assignee for him is evidence from which acceptance of the assignee may be inferred. *Jones v. O'Farrel*, 1 Nev. 354. See "*Partnership*," *Dec. Dig. (Key No.)* §§ 227, 255; *Cent. Dig.* §§ 143, 473-475, 552-561.

what is called a "subpartnership," which is sometimes designated a partnership within a partnership, and which arises when a partner agrees with an outsider to share with him his profits derived from the business. Such person is not a partner, accurately speaking, nor is he under a partnership liability. The term "subpartnership" is misleading. The so-called "subpartner" has no relations whatsoever with the firm, but only with the person with whom he has contracted.<sup>16</sup> Likewise, in that species of so-called partnerships designated "mining partnerships," the principle of *delectus personarum* does not enter, and the fact that it does not is sufficient to deny to them the character of perfect partnerships in the strict sense. They are anomalous relations, having many of the characteristics of a partnership.<sup>17</sup> So, also, in joint-stock companies there is no *delectus personarum*. This is anomalous, and may be explained by saying that the parties to such relation have agreed in advance that the respective shares may be transferred without affecting the partnership.<sup>18</sup>

*Effect upon the Partnership of Assignment by Partner of His Interest Therein*

If, notwithstanding the requirement of the principle of *delectus personarum*, a partner assigns his interest in the partnership to a stranger, what consequences follow? Unless the case falls within one of the apparent exceptions just discussed, the logical result of such an act is a dissolution of the partnership. Whether such a result will follow depends upon the time stipulated for the continuance of the relation.<sup>19</sup> If the partnership is one determinable at the

<sup>16</sup> See post, § 35, p. 106; *BURNETT v. SNYDER*, 76 N. Y. 844, *Gilmore, Cas. Partnership*, 117; *Nirdlinger v. Bernheimer*, 133 N. Y. 45, 30 N. E. 561. See "*Partnership*," *Dec. Dig. (Key No.)* § 23; *Cent. Dig.* § 9.

<sup>17</sup> *Kahn v. Central Smelting Co.*, 102 U. S. 641, 26 L. Ed. 266, *Gilmore, Cas. Partnership*, 120, note; *Duryea v. Burt*, 28 Cal. 569; *Spotswood v. Morris*, 12 Idaho, 360, 85 Pac. 1094, 6 L. R. A. (N. S.) 665. See post, chapter II, § 36, p. 107. See "*Mines and Minerals*," *Dec. Dig. (Key No.)* §§ 96-100; *Cent. Dig.* §§ 222-225.

<sup>18</sup> See post, p. 105.

<sup>19</sup> For further discussion of the subject, see post, p. 578.

will of the partners, the introduction of a stranger into the firm, by the conveyance to him of the share of one partner without the consent of the others, brings the relation to an end ipso facto.<sup>20</sup> If, however, the partnership is by the contract creating it to continue for a certain time, the American authorities are in considerable conflict as to the power of one partner, by his own acts, to put an end prematurely to the relation.<sup>21</sup> Some hold that it is inequitable and injurious to permit any partner to violate his engagement that the firm shall exist for a certain time.<sup>22</sup> Where this rule prevails, the partners who are aggrieved by the introduction of a new member have merely the right to apply to a court of equity for a receivership. There is no dissolution ipso facto, as in the case of a partnership at will.<sup>23</sup> But probably the weight of authority is with the cases holding that the right of a partner to dissolve the firm is

<sup>20</sup> *Wilson v. Waugh*, 101 Pa. 233; *Carter v. Roland*, 53 Tex. 540; *Fourth Nat. Bank v. New Orleans & C. R. Co.*, 11 Wall. 624, 20 L. Ed. 82; *Morss v. Gleason*, 64 N. Y. 204; *Blake v. Sweeting*, 121 Ill. 67, 12 N. E. 67. See "*Partnership*," *Dec. Dig. (Key No.)* § 264; *Cent. Dig.* §§ 324, 472, 608, 614, 617.

<sup>21</sup> The English courts hold that such a partnership cannot be dissolved by one partner. *BROWN v. HUTCHISON*, [1895] 2 Q. B. 128. See "*Partnership*," *Dec. Dig. (Key No.)* §§ 57-62, 259½; *Cent. Dig.* §§ 82-86, 601.

<sup>22</sup> *Cole v. Moxley*, 12 W. Va. 730; *Hannaman v. Karrick*, 9 Utah, 236, 33 Pac. 1039. Cf. with same case in 168 U. S. 335, 18 Sup. Ct. 135, 42 L. Ed. 484, where the court in taking the opposite view says: "An absolute assignment by one partner of all his interest in the partnership to a stranger dissolves the partnership. \* \* \* No partnership can efficiently or beneficially carry on its business without the mutual confidence and co-operation of all the partners. Even when, by the partnership articles, they have covenanted with each other that the partnership shall continue for a certain period, the partnership may be dissolved at any time, at the will of any partner, \* \* \* rendering the partner who breaks his covenant liable to an action at law for damages, as in other cases of breaches of contract." See "*Partnership*," *Dec. Dig. (Key No.)* § 259½; *Cent. Dig.* § 601.

<sup>23</sup> "It can hardly be that a partner, who has himself no right to dissolve or to introduce a new partner, can, by assigning his share, confer on the assignee a right to have the accounts of the firm taken, and the affairs thereof wound up, in order that he may obtain the benefit of his assignment." *Lindl. Partn.* 364.

a right inseparably incident to every partnership, whether at will or for a term of years.<sup>24</sup> In these jurisdictions, the introduction of a new member into a partnership for definite time would dissolve it ipso facto, just as it would a partnership at will. The only distinguishing feature would be the right of action of the aggrieved partners for damages for the premature dissolution of the firm.

### REQUIREMENTS OF THE CONTRACT

23. A contract for a partnership must comply in all respects with the requirements of a valid contract. These requirements will be considered under the following heads:
- (a) The competency of the parties.
  - (b) Consideration.
  - (c) Formalities to be observed.
  - (d) Subject-matter.

### SAME—COMPETENCY OF THE PARTIES

24. Parties competent to enter into ordinary contracts are competent to form a partnership. The capacity of the following persons will be specially considered:
- (a) Aliens (p. 78).
  - (b) Felons (p. 79).
  - (c) Infants (p. 79).
  - (d) Lunatics (p. 83).
  - (e) Married women (p. 85).
  - (f) Corporations (p. 88).
  - (g) Partnership between firms (p. 88).
  - (h) Number of persons who may become partners (p. 89).

<sup>24</sup> *Skinner v. Dayton*, 19 Johns. (N. Y.) 513, 538, 10 Am. Dec. 286. "Even where partners covenant with each other, that the partnership shall continue seven years, either partner may dissolve it the next day, by proclaiming his determination for that purpose; the only consequence being that he thereby subjects himself to a claim for damages for a breach of his covenant." *Howell v. Harvey*, 5

Like the parties to all other contracts, prospective partners must have the capacity to contract if they are to be the partners of each other. The question in each case is: What power has this individual at law to consent, so as to bind himself? As certain classes of persons are not competent in law to enter into contracts at all, or only under limitations and restrictions, it is necessary to consider such classes. The contractual capacity of aliens, felons, infants, lunatics, married women, and corporations must therefore be particularly examined. On the capacity of no other persons is there any doubt.

### *Aliens*

The rule is well established that the mere fact that a man is an alien will not render him ineligible as a partner, so long as the nation of which he is a citizen is not at war with the nation of his partner.<sup>25</sup> When, however, actual war breaks out between the United States and the nation of the alien, it not only prevents a voluntary resident of the latter from joining a partnership here, but the partnership, once formed, necessarily is suspended, and, in effect, dissolved, since the partners are barred from commercial intercourse with each other.<sup>26</sup>

Ark. 270, 39 Am. Dec. 376; *Lapenta v. Lettieri*, 72 Conn. 377, 44 Atl. 730, 77 Am. St. Rep. 315; *McKee v. Cowles*, 161 Ill. 201, 43 N. E. 785; *Richardson v. Gregory*, 126 Ill. 166, 18 N. E. 777; *SOLOMON v. KIRKWOOD*, 55 Mich. 256, 21 N. W. 336, *Gilmore, Cas. Partnership*, 589; *Slemmer's Appeal*, 58 Pa. 168, 98 Am. Dec. 255; *Becker v. Hill*, 20 Lanc. Law Rev. 345. Statutory provisions: Civ. Code Ga. § 2633; Civ. Code Mont. § 3262; Civ. Code N. D. § 5848; Civ. Code S. D. § 1753. See "*Partnership*," *Dec. Dig. (Key No.)* § 259½; *Cent. Dig.* §§ 600, 601.

<sup>25</sup> *GRISWOLD v. WADDINGTON*, 15 Johns. (N. Y.) 57, *Gilmore, Cas. Partnership*, 600; *McConnel v. Hector*, 3 Bos. & P. 113; *Brandon v. Nesbit*, 6 Term R. 23. See "*Partnership*," *Dec. Dig. (Key No.)* § 268; *Cent. Dig.* § 612; "*War*," *Cent. Dig.* § 30.

<sup>26</sup> *GRISWOLD v. WADDINGTON*, 15 Johns. (N. Y.) 57, *Gilmore, Cas. Partnership*, 600; *Hillyard v. Mutual Ben. Life Ins. Co.*, 35 N. J. Law, 415; *Woods v. Wilder*, 43 N. Y. 164, 3 Am. Rep. 684; *Bank of New Orleans v. Matthews*, 49 N. Y. 12; *Hanger v. Abbott*, 6 Wall. 532, 18 L. Ed. 939; *Kershaw v. Kelsey*, 100 Mass. 561, 97 Am. Dec. 124, 1 Am. Rep. 142; *Clemontson v. Blessig*, 11 Exch. 135. See further discussion chapter X, §§ 197, 198, pp. 570-573, *Termination of*

If the partnership and its business is of such a nature that an entire suspension of all intercourse during the war would not be inconsistent with a continuance of the relation, it might very well be regarded as revived on the suspension of hostilities.

### *Felons*

Since felons do not, in the absence of statutory restrictions, labor under any disability to contract in this country, they may, unless so restricted, be members of a partnership.<sup>27</sup>

### *Infants*

As an infant's contracts, with few exceptions,<sup>28</sup> are not void, but voidable merely, he may enter into a contract of partnership, which will be binding or not, according as he chooses to stand by it or repudiate it.<sup>29</sup> He incurs no personal responsibility during his minority, either to his co-partners on the partnership contract<sup>30</sup> or to third parties on contracts negotiated pursuant to the partnership enterprise.<sup>31</sup> He may, before becoming of age, or within a rea-

the Partnership. See "*Partnership*," *Dec. Dig. (Key No.)* § 268; *Cent. Dig.* § 612; "*War*," *Cent. Dig.* § 30.

<sup>27</sup> Pen. Code N. Y. §§ 707, 708; Code Cr. Proc. N. Y. § 819; *Avery v. Everett*, 110 N. Y. 317, 18 N. E. 148, 1 L. R. A. 284, 6 Am. St. Rep. 368. See "*Convicts*," *Dec. Dig. (Key No.)* §§ 3, 4; *Cent. Dig.* §§ 2, 3, 8.

<sup>28</sup> It is usually stated that contracts of infants are voidable, except those for necessities, which are binding, and those creating a power of attorney, which are said to be void. *Fetrow v. Wiseman*, 40 Ind. 148, 155. See "*Infants*," *Dec. Dig. (Key No.)* §§ 46-58; *Cent. Dig.* §§ 98-160.

<sup>29</sup> *Goode v. Harrison*, 5 Barn. & Ald. 147; *Dunton v. Brown*, 31 Mich. 182; *Osburn v. Farr*, 42 Mich. 134, 3 N. W. 299; *Whitney v. Dutch*, 14 Mass. 457, 7 Am. Dec. 229; *BUSH v. LINTHICUM*, 59 Md. 344. See "*Infants*," *Dec. Dig. (Key No.)* §§ 47, 54, 57, 58; *Cent. Dig.* §§ 132-134, 149, 150.

<sup>30</sup> *Neal v. Berry*, 86 Me. 193, 29 Atl. 987. See "*Infants*," *Dec. Dig. (Key No.)* §§ 47, 54; *Cent. Dig.* § 134.

<sup>31</sup> *SHIRK v. SCHULTZ*, 113 Ind. 571, 15 N. E. 12, *Gilmore, Cas. Partnership*, 125; *Gordon v. Miller*, 111 Mo. App. 342, 85 S. W. 943 (1905); *Bush v. Linthicum*, 59 Md. 344, *Gilmore, Cas. Partnership*, 126, note; *BIXLER v. KRESGE*, 169 Pa. 405, 32 Atl. 414, 47 Am. St. Rep. 920. In *Mehlhop v. Rae*, 90 Iowa, 30, 57 N. W. 650, it was held

sonable time thereafter, avoid the partnership agreement and all transactions pursuant thereto, even to the prejudice of a stranger dealing with him in ignorance of his minority.<sup>32</sup> What constitutes a reasonable time after majority within which the infant must disaffirm, if he would avoid personal liability, depends upon the facts of the particular case. Unless he disaffirms within a reasonable time, he may be held to have elected to stand by the contract, and the transactions consummated during his infancy. Mere continuance in the partnership, however, will not of itself constitute an affirmation of debts incurred prior to majority.<sup>33</sup> As to all contracts made by the firm after becoming of age, he is bound by continuing in the business.<sup>34</sup> Whether or not he has elected to be bound is a question of his intention, to be determined by his conduct and declarations.<sup>35</sup> The right to repudiate the partnership is the privilege of the

that the infant may repudiate a partnership contract with a third person, without also repudiating a partnership agreement. In *Miller v. Sims*, 2 Hill (S. C.) 479, it was held that an infant partner, confirming the contract of partnership after coming of age, subjects himself to all the liabilities of the firm incurred during his minority. See "*Infants*," *Dec. Dig. (Key No.)* §§ 47, 54; *Cent. Dig.* § 134.

<sup>32</sup> *Murphy v. Johnson*, 45 Iowa, 57; *Childs v. Dobbins*, 55 Iowa, 205, 7 N. W. 496; *Adams v. Beall*, 67 Md. 53, 8 Atl. 664, 1 Am. St. Rep. 379; *Folds v. Allardt*, 35 Minn. 488, 29 N. W. 201. In *Dunton v. Brown*, 31 Mich. 182, it was said that the infant could not disaffirm during minority and recover his capital and the value of his services. See "*Infants*," *Dec. Dig. (Key No.)* §§ 47, 54, 58; *Cent. Dig.* §§ 133, 134, 149, 150.

<sup>33</sup> *CONTINENTAL NAT. BANK OF BOSTON v. STRAUSS*, 137 N. Y. 148, 32 N. E. 1066; *Osburn v. Farr*, 42 Mich. 134, 3 N. W. 299; *Crabtree v. May*, 1 B. Mon. (Ky.) 289; *Dana v. Stearns*, 3 Cush. (Mass.) 372. See "*Infants*," *Dec. Dig. (Key No.)* §§ 47, 54, 57; *Cent. Dig.* §§ 134, 151.

<sup>34</sup> *Goode v. Harrison*, 5 B. & Ald. 147. Cf. *King v. Barbour*, 70 Ind. 35. In *Salinas v. Bennett*, 33 S. C. 285, 11 S. E. 908, it was held that an infant partner who continues his connection with the business after reaching majority ratifies all partnership transactions during his infancy. See "*Partnership*," *Dec. Dig. (Key No.)* § 155; *Cent. Dig.* § 278.

<sup>35</sup> *Jenkins v. Jenkins*, 12 Iowa, 195; *Minock v. Shortridge*, 21 Mich. 304; *Whitney v. Dutch*, 14 Mass. 457, 7 Am. Dec. 229; *Keegan v. Cox*, 116 Mass. 289; *Todd v. Clapp*, 118 Mass. 495; *Kemp*

infant. The adult partner is bound, both to the infant on the partnership agreement and to third parties on firm contracts. Nor can third parties set up the infancy of one of the partners as a ground for avoiding liability to the firm.<sup>86</sup> The right of repudiation being the infant's, and his contract being only voidable in all actions by and against the firm, he should be made a party.<sup>87</sup> While the adult partner is bound to the infant on the partnership agreement, he may, in case he has been induced to enter the contract by fraudulent representations of the infant that he is of age, or in case the infant is misconducting himself in relation to the firm business, have the partnership dissolved on that account.<sup>88</sup>

#### *Infant's Rights Before Repudiation*

Until the right of repudiation is exercised, the partnership relation continues, and the infant has all the rights and powers of an adult partner. He is entitled to equal posses-

v. Cook, 18 Md. 130, 79 Am. Dec. 681. See "*Infants*," *Dec. Dig.* (Key No.) §§ 57, 58; *Cent. Dig.* §§ 136-160.

<sup>86</sup> Stein v. Robertson, 30 Ala. 286; Halt v. Ward, 2 Str. 937; Warwick v. Bruce, 2 M. & S. 205; Willard v. Stone, 7 Cow. (N. Y.) 22, 17 Am. Dec. 496; Cannon v. Alsbury, 1 A. K. Marsh. (Ky.) 76, 10 Am. Dec. 709. The privilege of repudiation has been held to extend to the infants' legal representatives. Hussey v. Jewett, 9 Mass. 100; Martin v. Mayo, 10 Mass. 137, 6 Am. Dec. 103; Jackson v. Mayo, 11 Mass. 147, 6 Am. Dec. 167. See "*Infants*," *Dec. Dig.* (Key No.) § 58; *Cent. Dig.* § 150; "*Partnership*," *Dec. Dig.* (Key No.) § 24; *Cent. Dig.* § 10.

<sup>87</sup> Teed v. Elworthy, 14 East, 210; Osburn v. Farr, 42 Mich. 134, 3 N. W. 209; Wamsley v. Lindenberger, 2 Rand. (Va.) 478; Slocum v. Hooker, 13 Barb. (N. Y.) 536; Mason v. Denison, 15 Wend. 64. English and some American courts have held that an infant partner is not a proper party defendant; but these cases may often be explained on the ground that the infant's contract was treated as void and not voidable. Busgers v. Merrill, 4 Taunt. 468; Jaffray v. Frebain, 5 Esp. 47. See 1 Chitty on Pleading, pp. 14, 50, and notes; 1 Lindley on Part. (2d Am. Ed., Ewell), 74 and notes. See "*Partnership*," *Dec. Dig.* (Key No.) §§ 198-202; *Cent. Dig.* §§ 361-374; "*Infants*," *Dec. Dig.* (Key No.) § 74; *Cent. Dig.* §§ 188-190.

<sup>88</sup> Bush v. Linthicum, 59 Md. 344, Gilmore, Cas. Partnership, 126, note; Lempriere v. Lange, 12 Ch. Div. 675. While this last case is not one of partnership, it stands for the proposition announced. See "*Infants*," *Dec. Dig.* (Key No.) § 56; *Cent. Dig.* § 100.

sion with his adult copartner of the firm assets. He may incur and collect firm debts, buy and sell the firm property, and subject the partnership to liability in contract and tort by acts falling within the partnership business. He may also make contracts in the firm name, which, though voidable as to him, will bind his copartner and the firm assets.<sup>39</sup>

#### *Infant's Rights After Repudiation*

Where the rights of firm creditors are not involved, an infant partner, who has been induced by fraud to enter a partnership, may have the contract set aside and recover his contribution from the adult partner.<sup>40</sup> In the absence of fraud, however, he could probably not recover his contribution, especially where his contribution was in the form of time and services.<sup>41</sup> If the infant paid a premium or bonus to gain admission to the firm, it has been held that he cannot, upon repudiation of the contract, recover it.<sup>42</sup>

#### *Effect of Repudiation on Rights of Creditors*

While the infant may repudiate all personal liability on firm obligations, he cannot by so doing prevent the application of the firm assets to the payment of the firm debts, nor claim his original contribution to the adventure. This result may be stated as due to the right of the adult partner to have the assets acquired with the firm capital and in the course of the business applied to the firm debts. "The adult partner \* \* \* is entitled to insist that the partnership assets shall be applied in payment of the liabilities of the partnership, and that until these are provided for no part of them shall be received by the infant partner, and if the proper steps are taken this right of the adult partner can be made available for the benefit of the creditors."<sup>43</sup>

<sup>39</sup> *Parker v. Oakley* (Tenn. Ch. App.) 57 S. W. 426; *Bush v. Linthicum*, 59 Md. 344, 349, *Gillmore, Cas. Partnership*, 126, note. See "*Infants*," *Dec. Dig. (Key No.)* § 54; *Cent. Dig.* § 134.

<sup>40</sup> *Sparman v. Kelm*, 83 N. Y. 245. See "*Infants*," *Dec. Dig. (Key No.)* § 58; *Cent. Dig.* § 149.

<sup>41</sup> *Page v. Morse*, 128 Mass. 99; *Moley v. Brine*, 120 Mass. 324. See "*Infants*," *Cent. Dig.* § 133.

<sup>42</sup> *Adams v. Beall*, 67 Md. 53, 8 Atl. 664, 1 Am. St. Rep. 379; *Ex parte Taylor*, 8 DeG. M. & G. 254. See "*Infants*," *Cent. Dig.* § 133.

<sup>43</sup> *LOVELL v. BEAUCHAMP* [1894] A. C. 607, 611. See "*Infants*," *Cent. Dig.* § 134.

"If an infant goes into a mercantile adventure which proves unsuccessful, he ought at least to be held so far as that the assets acquired by the firm should be applied to the payment of the debts of the concern."<sup>44</sup> Another explanation of this result may be found in treating the firm as an entity distinct from its members and holding that this entity has acquired the title to the firm assets. The infant, being no longer the owner of the property, cannot reclaim it. The explanation, however, does not appear in the decided cases.<sup>45</sup> The chief advantage the infant partner gains in repudiating the firm obligations is that when the partnership property is exhausted, and his contribution is used, his liability ceases. He does not have to pay his pro rata share of the firm debts out of his individual resources, as do the adult partners.<sup>46</sup>

#### *Lunatics*

Whether a lunatic can enter into a partnership contract depends upon his capacity to enter into contracts generally. While the law is in some confusion on this subject, the following propositions appear to be established: Where the sane person is unaware of the other party's insanity, and there has been no formal adjudication of insanity, the contract is binding on the lunatic. If, however, the contract has not been executed, and the parties can be restored to their former position, it may be avoided.<sup>47</sup> If the sane party

<sup>44</sup> *Yates v. Lyon*, 61 N. Y. 344; *Page v. Morse*, 128 Mass. 99; *Moley v. Brine*, 120 Mass. 324; *Pelletier v. Couture*, 148 Mass. 269, 19 N. E. 400, 1 L. R. A. 863; *SHIRK v. SCHULTZ*, 113 Ind. 571, 15 N. E. 12, *Gilmore, Cas. Partnership*, 125. See "*Infants*," *Dec. Dig. (Key No.)* § 54; *Cent. Dig.* §§ 133, 134.

<sup>45</sup> *Burdick on Partnership* (2d Ed.) p. 97. It has been held that under the present federal bankruptcy act (Act July 1, 1898, c. 541, 30 Stat. 544 [U. S. Comp. St. 1901, p. 3418]) a firm containing an infant partner may be adjudicated bankrupt and the partnership assets applied to firm debts. The petition as to the infant partner was dismissed. *In re Dunnigan* (D. C.) 95 Fed. 428; *In re Duguld* (D. C.) 100 Fed. 274. See "*Bankruptcy*," *Dec. Dig. (Key No.)* § 69.

<sup>46</sup> *Gay v. Johnson*, 32 N. H. 167; *Yates v. Lyon*, 61 N. Y. 344; *WHITTEMORE v. ELLIOTT*, 7 Hun (N. Y.) 518. See "*Infants*," *Dec. Dig. (Key No.)* § 54; *Cent. Dig.* § 134.

<sup>47</sup> *Gribben v. Maxwell*, 34 Kan. 8, 7 Pac. 584, 55 Am. Rep. 233; *Young v. Stevens*, 48 N. H. 133, 2 Am. Rep. 202, 97 Am. Dec. 592;

is aware of the other's insanity, or if there has been a formal adjudication of insanity, of which the sane party is bound to take notice, the contract is voidable.<sup>48</sup> In some jurisdictions contracts by lunatics are made void.<sup>49</sup> Subject to the foregoing general principles, a lunatic may enter into a partnership.<sup>50</sup> The innocent partner is protected, as are other innocent partners; for a lunatic cannot avoid a contract made with him in good faith by one who had no knowledge of his insanity, save as his lunacy is cause for dissolution of the partnership.<sup>51</sup> If the partnership is to be set aside where the sane partner was ignorant of the other's condition, the parties must be restored to their former position.<sup>52</sup> The fact that a partner becomes insane during the existence of the partnership does not dissolve the latter ipso facto, but may be a ground of dissolution by a court of equity. Until such dissolution, the lunatic is

*Mutual Life Ins. Co. v. Hunt*, 79 N. Y. 541. Even if the contract has been executed, if the sane party can be put in statu quo, the contract is voidable. *Burnham v. Kidwell*, 113 Ill. 425. See "*Insane Persons*," *Dec. Dig. (Key No.)* § 72; *Cent. Dig.* § 125.

<sup>48</sup> *Carter v. Beckwith*, 128 N. Y. 312, 28 N. E. 582; *Wadsworth v. Sharpsteen*, 8 N. Y. 388, 59 Am. Dec. 499. In England the rule appears to be that a defendant who seeks to avoid a contract on the ground of his insanity must plead and prove, not merely his incapacity, but also the plaintiff's knowledge of that fact, and unless he proves these two things he cannot succeed. *Imperial Loan Co. v. Stone*, 1892, 1 Q. B. 599; *Drew v. Nunn*, L. R. 4 Q. B. D. 661. See "*Insane Persons*," *Dec. Dig. (Key No.)* § 73; *Cent. Dig.* §§ 125, 132-138.

<sup>49</sup> *Burns' Ann. St. Ind.* 1908, § 3110; *Civ. Code Ga.* 1895, § 3652. Contracts of lunatics under guardianship are declared void by *Civ. Code Cal.* §§ 38-40, and *Civ. Code S. D.* §§ 20-22. See "*Insane Persons*," *Dec. Dig. (Key No.)* § 73; *Cent. Dig.* §§ 125, 132-138.

<sup>50</sup> *Behrens v. McKenzie*, 23 Iowa, 333, 92 Am. Dec. 428; *Fay v. Burditt*, 81 Ind. 433, 42 Am. Rep. 142. See "*Insane Persons*," *Dec. Dig. (Key No.)* § 72; *Cent. Dig.* § 125.

<sup>51</sup> *Molton v. Camroux*, 2 Ex. 487, 4 Ex. 17. Nor is lunacy a defense to an action by an innocent person on an executed contract. *Drew v. Nunn*, 2 Q. B. D. 661; *Baxter v. Earl of Portsmouth*, 5 Barn. & C. 170. See "*Insane Persons*," *Dec. Dig. (Key No.)* § 73; *Cent. Dig.* §§ 125, 132-138.

<sup>52</sup> *Behrens v. McKenzie*, 23 Iowa, 333, 92 Am. Dec. 428; *Fay v. Burditt*, 81 Ind. 433, 42 Am. Rep. 142. While these are not partnership cases, it is submitted that the principle would govern the

entitled to a share of the profits made by the other partners, and is liable for their misconduct.<sup>53</sup>

### *Married Women*

At common law a married woman had no capacity to enter into contracts, except where she had a separate estate, or where her husband was a convicted felon, or an alien residing abroad, or where she had been abandoned by her husband, or judicially separated from him. Her capacity to be a partner was no greater than her capacity to contract.<sup>54</sup>

partnership contract, just as it does other contracts with lunatics. See "*Insane Persons*," *Dec. Dig. (Key No.)* § 73; *Cent. Dig.* § 133.

<sup>53</sup> RAYMOND v. VAUGHAN, 17 Ill. App. 144, affirmed 128 Ill. 256, 21 N. E. 566, 4 L. R. A. 440, 15 Am. St. Rep. 112, Gilmore, Cas. Partnership, 395; Reynolds v. Austin, 4 Del. Ch. 24. See "*Partnership*," *Dec. Dig. (Key No.)* § 274; *Cent. Dig.* § 621.

<sup>54</sup> De Graum v. Jones, 23 Fla. 83, 6 South. 925; Bradstreet v. Baer, 41 Md. 19; Carey v. Burruss, 20 W. Va. 571, 43 Am. Rep. 790; Brown v. Jewett, 18 N. H. 230; Gwynn v. Gwynn, 27 S. C. 525, 4 S. E. 229; Weisiger v. Wood, 36 S. C. 424, 15 S. E. 597; Frank v. Anderson, 13 Lea (Tenn.) 695; Brown v. Chancellor, 61 Tex. 437; Miller v. Marx, 65 Tex. 131.

The right of a married woman to engage in business as a sole trader has been recognized in cases where she has been abandoned by her husband—whether voluntarily or involuntarily—or has been separated from him. Bogget v. Frier, 11 East, 301; Krebs v. O'Grady, 23 Ala. 726, 58 Am. Dec. 312; Young v. Pollak, 85 Ala. 439, 5 South. 279; Schwartz v. Reesch, 2 App. Cas. (D. C.) 440; Love v. Moynehan, 16 Ill. 277, 63 Am. Dec. 306; Gregory v. Pierce, 4 Metc. (Mass.) 478; Huffer v. Riley, 47 Mo. App. 479; McArthur v. Bloom, 2 Duer (N. Y.) 151; King v. Paddock, 18 Johns. (N. Y.) 141; Cleaver v. Scheetz, 70 Pa. 496; Rhea v. Rhenner, 1 Pet. 105, 7 L. Ed. 72. Also, where her husband has been convicted of a felony: Lean v. Schutz, 2 W. Bl. 1195; Corbett v. Poelnitz, 1 T. R. 5; Marshall v. Rutton, 8 T. R. 545; Carrol v. Blencow, 4 Esp. 27. Also, where the husband is an alien who has never resided in the country: Deerly v. Mazarine, 1 Salk. 119; De Gallow v. L'Aizle, 1 B. & B. 357; Marsh v. Hutchison, 2 B. & P. 226; Farber v. Granarile, 4 B. & P. 80; Walford v. De Plenne, 2 Esp. 554; Abbot v. Bayley, 6 Pick. (Mass.) 89.

The foregoing cases, recognizing the right to engage in business as a sole trader, would seem to authorize the engaging in business as a partner. See "*Husband and Wife*," *Dec. Dig. (Key No.)* §§ 91-100; *Cent. Dig.* §§ 365-376.

The common-law disability has been removed or modified by statute in most states. The extent to which she may now make contracts and enter into partnership will depend upon the extent of her statutory emancipation. While these statutes are similar in their main features the wording of each and its judicial interpretations must be separately examined, in order to ascertain her contractual capacity in any particular jurisdiction. In most states she may enter into partnership contract with any person except her own husband.<sup>55</sup> Statutes, however, which secure to a married woman merely the use or control and profits of her separate estate, have been held not to authorize her to engage in partnership.<sup>56</sup>

*Same—Partnership between Husband and Wife*

At common law a married woman could not enter into contracts with her own husband, and consequently she could not join him in partnership. It is generally held that the statutory changes do not remove the disability.<sup>57</sup> In

<sup>55</sup> *Abbott v. Jackson*, 43 Ark. 212; *Camden v. Mullen*, 29 Cal. 565; *Francis v. Dickel*, 68 Ga. 255; *Conant v. National State Bank of Terre Haute*, 121 Ind. 323, 22 N. E. 250; *Vail v. Winterstein*, 94 Mich. 230, 53 N. W. 932, 18 L. R. A. 515, 34 Am. St. Rep. 334; *Newman v. Morris*, 52 Miss. 402; *Scott v. Conway*, 58 N. Y. 619; *Fremont First Nat. Bank v. Rice*, 12 O. C. D. 121, 22 Ohio Cir. Ct. R. 183; *Loeb v. Mellinger*, 12 Pa. Super. Ct. 592; *Elliott v. Hawley*, 34 Wash. 585, 76 Pac. 93, 101 Am. Rep. 1016; *Krouskop v. Shontz*, 51 Wis. 204, 8 N. W. 241, 37 Am. Rep. 817. See "*Husband and Wife*," *Dec. Dig. (Key No.)* §§ 42, 97; *Cent. Dig.* §§ 225, 373.

<sup>56</sup> *Bradstreet v. Baer*, 41 Md. 19; *Landers v. Dithridge*, 2 Pa. Co. Ct. 560; *Lycoming Fire Ins. Co. v. Fetterman*, 2 Dauph. Co. Rep. (Pa.) 337; *Hagan v. Hoover*, 33 S. C. 219, 11 S. E. 725; *Gwynn v. Gwynn*, 27 S. C. 525, 4 S. E. 229; *Bradford v. Johnson*, 44 Tex. 381. See "*Husband and Wife*," *Dec. Dig. (Key No.)* §§ 42, 97; *Cent. Dig.* §§ 225, 373.

<sup>57</sup> *Gilkerson-Sloss Commission Co. v. Salinger*, 56 Ark. 294, 19 S. W. 747, 16 L. R. A. 523, 35 Am. St. Rep. 105; *Barlow Bros. Co. v. Parsons*, 73 Conn. 696, 49 Atl. 205; *Scarlett v. Snodgrass*, 92 Ind. 262; *Clay v. Vanwinkle*, 75 Ind. 239; *Montgomery v. Sprankle*, 31 Ind. 113; *Squire v. Belden*, 2 La. 268; *Mayer v. Soyster*, 30 Md. 402; *Lord v. Parker*, 3 Allen (Mass.) 127; *Bowker v. Bradford*, 140 Mass. 521, 5 N. E. 480; *Artman v. Ferguson*, 73 Mich. 146, 40 N. W. 907, 2 L. R. A. 345, 16 Am. St. Rep. 572; *Jacquin v. Jacquin*, 15 Abb. N. C. (N. Y.) 408; *Payne v. Thompson*, 44 Ohio St. 192, 5 N. E. 654;

some jurisdictions, either by reason of express statutory provision or by judicial construction, the partnership relation between husband and wife is recognized, and the present tendency of the decisions is to allow a married woman to become a partner, even with her husband, where the right to contract is given to her generally, as distinguished from the right to contract merely as to her separate property.<sup>55</sup>

*Purdum v. Boyd*, 82 Tex. 130, 17 S. W. 606; *Brown v. Chancellor*, 61 Tex. 437; *Steinback v. Weill*, 1 White & W. Civ. Cas. Ct. App. (Tex.) § 934; *Cockrum v. McCracken*, 1 White & W. Civ. Cas. Ct. App. (Tex.) § 65; *Board of Trade of City of Seattle v. Hayden*, 4 Wash. 263, 30 Pac. 87, 32 Pac. 224, 16 L. R. A. 530, 31 Am. St. Rep. 919; *Fuller & Fuller Co. v. McHenry*, 83 Wis. 573, 53 N. W. 896, 18 L. R. A. 512.

In *Board of Trade of City of Seattle v. Hayden*, 4 Wash. 263, 30 Pac. 87, 32 Pac. 224, 16 L. R. A. 530, 31 Am. St. Rep. 919, in denying the capacity of the wife to enter into partnership with her husband, Stiles, J., said: "In the foreground of the discussion is placed the proposition that the purpose of the statute is to free the wife from the control and influence of her husband, and to relieve her property from his debts and management; but the next following suggestion, that unless she can become his partner she will not be wholly free, if yielded to, will place her and her property within touch of the very dangers which it is sought in the first place to withdraw her from. Her improvident husband, by the most ordinary persuasion, or by his mere declaration made in her presence, as in the case at bar, could, in spite of her, unless she assumed a hostility which would endanger the continuance of the marriage relation, waste and dissipate her entire estate, and thus the very purpose which, it seems to us, stands out the most clearly in the act in question—i. e., to secure her protection in the management and enjoyment of her estate—would be defeated." See "*Husband and Wife*," *Dec. Dig. (Key No.)* § 42; *Cent. Dig.* § 225.

<sup>55</sup> *HOAGLIN v. C. M. HENDERSON & CO.*, 119 Iowa, 720, 94 N. W. 247, 61 L. R. A. 756, 97 Am. St. Rep. 335, *Gilmore, Cas. Partnership*, 121; *Belser v. Tuscumbia Banking Co.*, 105 Ala. 514, 17 South. 40 (subpartner); *Vizard v. Moody*, 119 Ga. 918, 47 S. E. 348; *Ellis v. Mills*, 99 Ga. 490, 27 S. E. 740; *BURNEY v. SAVANNAH GROCERY CO.*, 98 Ga. 711, 23 S. E. 915, 58 Am. St. Rep. 342; *Heyman v. Heyman*, 210 Ill. 524, 71 N. E. 591 (affirming 110 Ill. App. 87); *Louisville & N. R. Co. v. Alexander*, 27 S. W. 981, 16 Ky. Law Rep. 306; *Suau v. Caffé*, 122 N. Y. 308, 25 N. E. 488, 9 L. R. A. 593; *Hook v. Kenyon*, 55 Hun, 598, 9 N. Y. Supp. 40; *Lane*

### *Corporations*

A corporation may be expressly authorized by its charter to enter into a partnership.<sup>59</sup> In the absence of such authorization, however, a corporation is not competent to form a partnership, whether with an individual, a firm, or another corporation.<sup>60</sup> This does not mean, however, that while acting within the scope of its corporate powers, and without actually becoming a partner, a corporation may not so contract as to incur, as to third persons, a joint liability.<sup>61</sup>

### *Partnership between Firms*

While the law does not recognize a partnership as an entity, nevertheless there is no inaccuracy in saying that one firm may enter into a contract of partnership with another firm or with an individual. As between the parties to such a contract, in keeping accounts, making contributions, and distributing profits, the firm is treated as an entity. As regards third parties, however, the firm joining in such an

v. Bishop, 65 Vt. 575, 27 Atl. 499; In re Kinkead, 3 Biss. 405, Fed. Cas. No. 7,824.

In England a married woman with a separate estate may be a partner with her husband. *Butler v. Butler*, 16 Q. B. Div. 374. See "*Husband and Wife*," *Dec. Dig. (Key No.)* § 42; *Cent. Dig.* § 225.

<sup>59</sup> For example of such a charter, see *Butler v. Toy Co.*, 46 Conn. 136. See "*Corporations*," *Dec. Dig. (Key No.)* § 379; *Cent. Dig.* § 1538.

<sup>60</sup> *White Star Line v. Star Line of Steamers*, 141 Mich. 604, 105 N. W. 135, 113 Am. St. Rep. 551 (1905); *People v. North River Sugar Refining Co.*, 121 N. Y. 582, 24 N. E. 834, 9 L. R. A. 33, 18 Am. St. Rep. 843; *Morris Run Coal Co. v. Barclay Coal Co.*, 68 Pa. 173, 8 Am. Rep. 159; *Aurora State Bank v. Oliver*, 62 Mo. App. 390. A national bank cannot become a partner. *MERCHANTS' NAT. BANK v. WEHRMANN et al.* (1903) 69 Ohio St. 160, 68 N. E. 1004, Gilmore, Cas. Partnership, 131. A department store corporation cannot form a partnership with a restaurateur. *Franz et al. v. Wm. Barr Dry Goods Co.*, 132 Mo. App. 8, 111 S. W. 636 (1908); *Breinig v. Sparrow*, 39 Ind. App. 455, 80 N. E. 37. See "*Corporations*," *Dec. Dig. (Key No.)* § 379; *Cent. Dig.* § 1538.

<sup>61</sup> *Marine Bank of Chicago v. Ogden*, 29 Ill. 248; *Cleveland Paper Co. v. Courier Co.*, 67 Mich. 152, 34 N. W. 558. See "*Corporations*," *Dec. Dig. (Key No.)* §§ 378, 379; *Cent. Dig.* §§ 1538, 1539.

arrangement loses its identity, and each member becomes liable as a partner in the joint concern.<sup>62</sup>

*Number of Persons Who may Become Members of the Partnership*

In the absence of statutory enactments, there is no limit on the number of persons who may join in partnership. For statutory limitations the laws of the particular jurisdiction should be consulted.<sup>63</sup>

### SAME—CONSIDERATION

**25. A partnership agreement, like other contracts, must have a consideration to support it.**

Agreements to become partners, like all other agreements, must be founded upon some consideration in order to be binding. The mutual covenants and promises of the partners with respect to the common enterprise are regarded as constituting sufficient consideration. The promises by each to contribute capital, services, or credit, and to perform the duties and liabilities of a partner, in consideration of similar promises by the others, will constitute a binding agreement.<sup>64</sup> Any contribution in the shape of

<sup>62</sup> In re Hamilton (D. C.) 1 Fed. 800; *RAYMOND v. PUTNAM*, 44 N. H. 160, Gilmore, Cas. Partnership, 490; *Bullock v. Hubbard*, 23 Cal. 496, 83 Am. Dec. 130; *Meador v. Hughes*, 14 Bush (Ky.) 652. A partnership between individuals and a second partnership constitutes all members of the second partnership members of the first. *Meyer v. Krohn*, 114 Ill. 574, 2 N. E. 495; *North Pac. Lumber Co. v. Spore*, 44 Or. 462, 75 Pac. 890; *Willson v. Morse*, 117 Iowa, 581, 91 N. W. 823. See "*Partnership*," *Dec. Dig. (Key No.)* §§ 16, 23; *Cent. Dig.* § 9.

<sup>63</sup> By English Companies Act, 1862 (25 & 26 Vict. c. 89, § 4), no more than ten persons may engage as partners in banking, and not more than twenty in any other kind of partnership for profit.

There must of necessity be more than one person in the partnership. *Stirling v. Helntzman*, 42 Mich. 449, 4 N. W. 165. See "*Partnership*," *Dec. Dig. (Key No.)* § 43; *Cent. Dig.* § 60.

<sup>64</sup> *Byrd v. Fox*, 8 Mo. 574; *COLEMAN v. EYRE*, 45 N. Y. 38, Gilmore, Cas. Partnership, 137. See, also, *Brady v. Powers*, 112 App. Div. 845, 98 N. Y. Supp. 237 (modifying 105 App. Div. 476, 94 N. Y.

capital or labor, or any act which may result in liability to third parties, is a sufficient consideration to support such an agreement. Allowing the use of one's name is sufficient consideration.<sup>65</sup> A promise to account for one-half of the profits is supported by a promise to share one-half of the losses.<sup>66</sup> Nor need the contribution to the firm assets be equal in value, for the partners are the best judges of the adequacy of the consideration of the agreement into which they enter.<sup>67</sup> Where, however, one person, without furnishing any means or doing anything whatever toward the common enterprise, is to share equally in the profits and the firm property, there is no mutuality in the arrangement, and such agreement is unenforceable.<sup>68</sup> But if such person participates in the business, and thus subjects himself to partnership liability for firm obligations, the agreement will be binding.<sup>69</sup>

Supp. 259); *Breslin v. Brown*, 24 Ohio St. 565, 15 Am. Rep. 627; *Rush Center Creamery Co. v. Hillis*, 3 Pa. Super. Ct. 527; *Belcher v. Conner*, 1 S. C. 88; *Kimmins v. Wilson*, 8 W. Va. 584; *In re Wedgwood Coal, etc., Co.*, 7 Ch. D. 75, 47 L. J. Ch. 273, 37 L. T. Rep. 442; *Dale v. Hamilton*, 5 Hare, 369; 67 Eng. Reprint 955; *The Herkimer, Stew.* (Nova Scotia) 17. See "*Partnership*," *Dec. Dig.* (Key No.) § 19; *Cent. Dig.* § 5.

<sup>65</sup> *McCord v. Field*, 27 U. C. C. P. 391; *Breslin v. Brown*, 24 Ohio St. 565, 15 Am. Rep. 627. See "*Partnership*," *Dec. Dig.* (Key No.) § 19; *Cent. Dig.* § 5; "*Contracts*," *Cent. Dig.* § 345.

<sup>66</sup> *COLEMAN v. EYRE*, 45 N. Y. 38, Gilmore, Cas. Partnership, 137. See "*Partnership*," *Dec. Dig.* (Key No.) § 19; *Cent. Dig.* § 5; "*Contracts*," *Cent. Dig.* § 352.

<sup>67</sup> "If one man has skill and wants capital to make that skill available, and another has capital and wants skill, and the two agree that the one shall provide capital and the other skill, it is perfectly clear that there is a good consideration for the agreement on both sides; and it is impossible for the court to measure the quantum of value. The parties must decide that for themselves." Vice Chancellor Wigram, in *Dale v. Hamilton*, 5 Hare, 369, 393. See "*Partnership*," *Dec. Dig.* (Key No.) § 19; *Cent. Dig.* § 5; "*Contracts*," *Cent. Dig.* §§ 344, 345, 352.

<sup>68</sup> *Trayes v. Johns*, 11 Colo. App. 219, 52 Pac. 1113; *Mitchell v. O'Neale*, 4 Nev. 504; *Frothingham v. Seymour*, 118 Mass. 489; *Alabama Fertilizer Co. v. Reynolds*, 79 Ala. 497; *Kimmins v. Wilson*, 8 W. Va. 584. See "*Partnership*," *Dec. Dig.* (Key No.) § 19; *Cent. Dig.* § 5; "*Contracts*," *Cent. Dig.* §§ 344, 345, 352.

<sup>69</sup> *Emery v. Willson*, 79 N. Y. 78; *Guccione v. Scott*, 21 Misc. Rep.

*Premiums*

When one is admitted into a partnership with a person who is already established in business, he frequently agrees to pay the latter a premium or bonus; i. e., a sum of money for his own private benefit. This premium belongs individually to the former owner of the business, and forms no part of the firm assets.

Such an agreement is valid, and gives a plaintiff who is ready and willing to take the defendant into partnership a good cause of action for the premium.<sup>70</sup> The only difficult question is as to whether any of the premium is returnable in the event the partnership is terminated sooner than is expected, either by reason of fraud or total or partial failure of consideration. This, however, involves no principles peculiar to partnership law alone, and is governed by the law applicable to all contracts.<sup>71</sup> Where a premium has been obtained by false and fraudulent representations, the defrauded partner may make his loss good either by having the partnership accounts taken or by disaffirming the contract and thereby recovering the money paid directly.<sup>72</sup> In the absence of fraud, where the partnership is terminated sooner than contemplated, whether by

410, 47 N. Y. Supp. 475; *Id.*, 33 App. Div. 214, 53 N. Y. Supp. 462; *Geddes v. Wallace*, 2 Bligh, 270; *Heyhoe v. Burge*, 9 C. B. 431.

The surrender by one partner of his right to withdraw from the firm and continuance therein is a good consideration for the promise of his copartners that he should have one-half the net assets of the firm upon dissolution in addition to one-half of the profits during the continuance of the firm. *Melville v. Kruse*, 69 App. Div. 211, 74 N. Y. Supp. 826; *Id.*, 174 N. Y. 306; 66 N. E. 965. See "*Partnership*," *Dec. Dig. (Key No.)* § 19; *Cent. Dig.* § 5; "*Contracts*," *Cent. Dig.* §§ 344, 345, 352.

<sup>70</sup> *Walker v. Harris*, 1 Anstr. 245. See, also, post, p. 484, "Actions between Partners," chapter VIII, § 160. See "*Partnership*," *Dec. Dig. (Key No.)* § 19; *Cent. Dig.* § 5.

<sup>71</sup> *SMITH v. EVERETT*, 126 Mass. 304, *Gilmore, Cas. Partnership*, 608; *Tournade v. Hagedorn*, 5 Thomp. & C. (N. Y.) 288; *Capen v. Barrows*, 1 Gray (Mass.) 376. See "*Partnership*," *Dec. Dig. (Key No.)* §§ 25, 304; *Cent. Dig.* §§ 11, 701.

<sup>72</sup> *Ex parte Turquand*, 2 M. D. & D. 339; *Burg v. Allen*, 1 Coll. 589. See "*Partnership*," *Dec. Dig. (Key No.)* §§ 25, 304; *Cent. Dig.* §§ 11, 701.

death or otherwise, the tendency of the cases is to hold that, if persons wish to secure a return of the premium, they should cover such contingencies in the partnership articles.<sup>73</sup>

### SAME—FORMALITIES

26. No particular formalities are essential to the validity of a contract of partnership. The existence of the contract may be implied from the conduct of the parties.

In the absence of statute, the partnership agreement may be either express or implied, in writing or oral. While the terms of the agreement are ordinarily set forth in writing, a valid partnership may exist although no express agreement may be discovered. It may be established solely from the conduct of the parties.<sup>74</sup> On the other hand, merely calling the relationship a partnership will not

<sup>73</sup> Taylor v. Hare, 1 Bos. & P. (N. S.) 260; Whincup v. Hughes, L. R. 6 C. P. 78; Ferns v. Carr, 28 Ch. Div. 409; Farr v. Pearce, 8 Madd. 74.

Eng. Partnership Act, 1890, § 40, provides: "Where one partner has paid a premium to another on entering into a partnership for a fixed term, and the partnership is dissolved before the expiration of that term otherwise than by the death of a partner, the court may order the repayment of the premium, or of such part thereof as it thinks just, having regard to the terms of the partnership contract and to the length of time during which the partnership has continued; unless (a) the dissolution is, in the judgment of the court, wholly or chiefly due to the misconduct of the partner who paid the premium, or (b) the partnership has been dissolved by an agreement containing no provision for a return of any part of the premium." See "*Partnership*," *Dec. Dig. (Key No.)* § 304; *Cent. Dig.* § 701.

<sup>74</sup> Breinig v. Sparrow, 39 Ind. App. 455, 80 N. E. 37 (1907); DAVIS v. DAVIS, 1 Ch. (1894) 393; Ratzer v. Ratzer, 28 N. J. Eq. 137; Haug v. Haug, 193 Ill. 645, 61 N. E. 1053; Buffum v. Buffum, 49 Me. 108, 77 Am. Dec. 249; Hirbour v. Reeding, 3 Mont. 15; Sanger v. French, 157 N. Y. 213, 51 N. E. 979; Everhart v. Everhart, 4 Luz. Leg. Reg. (Pa.) 259; Fernandez v. De la Rosa, 1 Philippine, 871. See "*Partnership*," *Dec. Dig. (Key No.)* §§ 20, 22, 29; *Cent. Dig.* §§ 1, 6, 7, 8, 30-33, 38.

make it one. The term may have been used in a popular sense, and the real relationship may be something quite different.<sup>75</sup> In some states there are statutes requiring agreements for all partnerships to be in writing, duly executed and recorded; in all the states not only writing, but publication, and sometimes still other formalities, are required in the case of limited partnership.<sup>76</sup> Unless these requirements are strictly observed, the parties will be held liable as general partners.

### SAME—STATUTE OF FRAUDS

27. Partnership agreements that are not to be performed within the space of one year are required by the Statute of Frauds to be in writing. If, however, parties act upon an oral agreement, they will be treated as partners at will.
28. While the decisions are conflicting, by the weight of authority the Statute of Frauds does not require the partnership contract to be in writing in order to enable the partners to show that real estate constitutes partnership assets.

#### *Statute of Frauds*

In considering the application of the Statute of Frauds to partnership agreements, we have first to examine that provision of the fourth section which prescribes that all agreements which are not to be performed within the space of one year from the making thereof shall be in writing. This provision covers, not only partnerships to commence more than a year from the date of the agreement, but also agreements for present partnerships that are to last more than a year.<sup>77</sup> But if in either case the parties have acted

<sup>75</sup> *Sallors v. Nixon-Jones Printing Co.*, 20 Ill. App. 509. See "*Partnership*," *Dec. Dig. (Key No.)* §§ 17, 20, 22; *Cent. Dig.* §§ 1, 3, 6-8, 14.

<sup>76</sup> See the statutes of the various states. As to limited partnership, see post, chapter XI, §§ 211-214, pp. 604-617.

<sup>77</sup> *Stitt v. Rat Portage Lumber Co.*, 98 Minn. 52, 107 N. W. 824 (1906); *Smith v. Tarlton*, 2 Barb. Ch. (N. Y.) 336; *Whipple v. Park-*

on the agreement, and have become partners, they must be treated as such, and the statute will not apply.<sup>78</sup> In such case they will be treated as partners at will.<sup>79</sup>

*Same—Partnerships in Real Estate*

The other important provisions of the Statute of Frauds provide that no estate or interest in lands shall be created, assigned, or declared except by deed in writing, and that all contracts for the sale of land or any interest therein shall be in writing. To what extent these provisions require a contract of partnership to be in writing is a question on which there is much confusion and conflict of authority. Whether the contract is for the formation of an ordinary commercial partnership, in the conduct of which real estate may be incidentally involved as an asset, or for the formation of a partnership for the special purpose of dealing in land, the weight of authority is apparently to the effect that the statute does not require it to be in writing.<sup>80</sup>

er, 29 Mich. 369. But see *Shropshire v. Adams* (1905) 40 Tex. Civ. App. 339, 89 S. W. 448, Gilmore, Cas. Partnership, 138, note, holding a verbal contract of partnership to be valid, since the death of one of the partners might work a dissolution at any time. See "*Frauds, Statute of*," *Dec. Dig. (Key No.)* §§ 44, 49, 56; *Cent. Dig.* §§ 74, 135-139, 159.

<sup>78</sup> *McNealy v. Bartlett*, 123 Mo. App. 58, 99 S. W. 767; *Allison v. Perry*, 130 Ill. 9, 22 N. E. 492; *Coward v. Clanton*, 79 Cal. 23, 21 Pac. 359; *Gates v. Fraser*, 6 Ill. App. 229. See "*Frauds, Statute of*," *Dec. Dig. (Key No.)* § 76; *Cent. Dig.* §§ 135-139.

<sup>79</sup> *Wahl v. Barnum*, 116 N. Y. 87, 22 N. E. 280, 5 L. R. A. 623. See "*Partnership*," *Dec. Dig. (Key No.)* § 261; *Cent. Dig.* §§ 600, 601; "*Frauds, Statute of*," *Cent. Dig.* § 66.

<sup>80</sup> *Causler v. Wharton*, 62 Ala. 358; *McClintock v. Thweatt*, 71 Ark. 323, 73 S. W. 1093; *Bates v. Babcock*, 95 Cal. 479, 30 Pac. 605, 16 L. R. A. 745, 29 Am. St. Rep. 133; *Coward v. Clanton*, 79 Cal. 23, 21 Pac. 359; *Meylette v. Brennan*, 20 Colo. 242, 38 Pac. 75; *Meagher v. Reed*, 14 Colo. 367, 24 Pac. 681, 9 L. R. A. 455; *Murley v. Ennis*, 2 Colo. 300; *Bunnell v. Taintor's Adm'r*, 4 Conn. 568; *Van Housen v. Copeland*, 180 Ill. 74, 54 N. E. 169; *Speyer v. Desjardins*, 144 Ill. 641, 32 N. E. 283, 36 Am. St. Rep. 473; *Allison v. Perry*, 130 Ill. 9, 22 N. E. 492; *Horne v. Ingraham*, 125 Ill. 198, 16 N. E. 868; *Bopp v. Fox*, 63 Ill. 540; *Eaton v. Graham*, 104 Ill. App. 296; *Frankenstein v. North*, 79 Ill. App. 669; *Van Housen v. Copeland*, 79 Ill. App. 139; *Hunt v. Elliott*, 80 Ind. 245, 41 Am. Rep. 794; *Holmes v. McCray*, 51 Ind. 358, 19 Am. Rep. 735; *PEN-*

The result is explained in several ways: Partnership is a relation resulting from a contract, and whether there is a contract giving rise to such a relation is a question of fact, which may be shown by oral evidence. The contract being thus proved, the relation of partnership is established. Oral evidence may then be used to show what constitutes the assets of such partnership, and the interest of the part-

NYBACKER v. LEARY, 65 Iowa, 220, 21 N. W. 575, Gilmore, Cas. Partnership, 214; Richards v. Grinnell, 63 Iowa, 44, 18 N. W. 668, 50 Am. Rep. 727; Jones v. Davies, 60 Kan. 309, 56 Pac. 484, 72 Am. St. Rep. 354; Tenney v. Simpson, 37 Kan. 363, 15 Pac. 187; MARSH v. DAVIS, 33 Kan. 326, 6 Pac. 612, Gilmore, Cas. Partnership, 133; Simon v. Gullick, 50 S. W. 992, 104 Ky. Law Rep. 104; Garth v. Davis & Johnson, 120 Ky. 106, 85 S. W. 602, 117 Am. St. Rep. 571; Collins v. Decker, 70 Me. 28; Petrie v. Torrent, 88 Mich. 43, 49 N. W. 1076; Davis v. Gerber, 69 Mich. 246, 37 N. W. 281; Morgart v. Smouse, 103 Md. 463, 63 Atl. 1070, 115 Am. St. Rep. 367; Fall River Whaling Co. v. Borden, 10 Cush. (Mass.) 458; Howard v. Priest, 5 Metc. (Mass.) 582; Stitt v. Rat Portage Lumber Co., 98 Minn. 52, 107 N. W. 824; Fountain v. Menard, 53 Minn. 443, 55 N. W. 601, 39 Am. St. Rep. 617; Newell v. Cochran, 41 Minn. 374, 43 N. W. 84; Sherwood v. St. Paul & C. Ry. Co., 21 Minn. 127; Connell v. Mulligan, 13 Smedes & M. (Miss.) 388; Hunter v. Whitehead, 42 Mo. 524; Springer v. Cabell, 10 Mo. 640; Hirbourn v. Reeding, 3 Mont. 15; Personette v. Pryme, 34 N. J. Eq. 26; CHESTER v. DICKERSON, 54 N. Y. 1, 13 Am. Rep. 530, Gilmore, Cas. Partnership, 136; Fairchild v. Fairchild, 64 N. Y. 471; Smith v. Tarlton, 2 Barb. Ch. (N. Y.) 336; WILLIAMS v. GILLIES, 75 N. Y. 197; Traphagen v. Burt, 67 N. Y. 30; Falkner v. Hunt, 73 N. C. 571; Flower v. Barnekoff, 20 Or. 132, 25 Pac. 370, 11 L. R. A. 149; Knott v. Knott, 6 Or. 142; Howell v. Kelly, 149 Pa. 473, 24 Atl. 224; Davenport v. Buchanan, 6 S. D. 376, 61 N. W. 47; Murrell v. Mandelbaum, 85 Tex. 22, 19 S. W. 880, 34 Am. St. Rep. 777; Miller v. Ferguson, 107 Va. 249, 57 S. E. 649, 122 Am. St. Rep. 840; Henderson v. Hudson, 1 Munf. (Va.) 510; BROOKE v. WASHINGTON, 8 Grat. (Va.) 248, 56 Am. Dec. 142, Gilmore, Cas. Partnership, 318; McCully v. McCully, 78 Va. 159; Case v. Seger, 4 Wash. St. 492, 30 Pac. 646; McElroy v. Swope, 47 Fed. 380; Wright v. Smith, 105 Fed. 841, 45 C. C. A. 87; Forster v. Hale, 5 Ves. Jr. 309; Dale v. Hamilton, 5 Hare, 369.

Contra: Causler v. Wharton, 62 Ala. 358; Rowland v. Boozer, 10 Ala. 690; Roughton v. Rawlings, 88 Ga. 819, 16 S. E. 89; GOLDSTEIN v. NATHAN, 158 Ill. 641, 42 N. E. 72; Gantt v. Gantt, 6 La. Ann. 677; Pecot v. Armelin, 21 La. Ann. 667; Slocomb v. De Lizardi, 21 La. Ann. 355, 99 Am. Dec. 740; Dunbar v. Bullard, 2 La. Ann. 810; Parsons v. Phelan, 134 Mass. 109; Raub v. Smith, 61 Mich. 543, 23 N. W. 676, 1 Am. St. Rep. 619; Norton v. Brink,

ners therein.<sup>81</sup> Whether this is anything more than an application of the doctrine of implied or resulting trusts to cases where partnership funds have been invested in land, the legal title to which is held by one partner subject to a

75 Neb. 566, 110 N. W. 669, 7 L. R. A. (N. S.) 945, 121 Am. St. Rep. 822; *Schultz v. Waldons*, 60 N. J. Eq. 71, 47 Atl. 187; *Clancy v. Craine*, 17 N. C. 363; *Everhart's Appeal*, 106 Pa. 349; *Lefevre's Appeal*, 69 Pa. 122; *McCormick's Appeal*, 57 Pa. 54, 98 Am. Dec. 191; *Langley v. Sanborn*, 135 Wis. 178, 114 N. W. 787; *Scheuer v. Cochem*, 126 Wis. 209, 105 N. W. 573, 4 L. R. A. (N. S.) 427; *McMillen v. Pratt*, 89 Wis. 612, 62 N. W. 588; *Bird v. Morrison*, 12 Wis. 138; *Smith v. Burnham*, 3 Sumn. 435, Fed. Cas. No. 13,019; *Young v. Wheeler* (C. C.) 34 Fed. 98; *McKinley v. Lloyd* (C. C.) 128 Fed. 510.

Where the agreement is merely to share the profits and losses arising from the use of land, owned either by one of the parties or by both, the statute is not applicable. *McClintock v. Thweatt*, 71 Ark. 323, 73 S. W. 1093; *Von Trotha v. Bamberger*, 15 Colo. 1, 24 Pac. 883; *Kilbourn v. Latta*, 5 Mackey (D. C.) 304, 60 Am. Rep. 373; *PENNYBACKER v. LEARY*, 65 Iowa, 220, 21 N. W. 575, *Gilmore, Cas. Partnership*, 214; *Davis v. Gerber*, 69 Mich. 246, 37 N. W. 291; *Newell v. Cochran*, 41 Minn. 374, 43 N. W. 84; *Pitman v. Hodge*, 67 N. H. 101, 36 Atl. 605; *Babcock v. Read*, 99 N. Y. 609, 1 N. E. 141; *Falkner v. Hunt*, 73 N. C. 571; *Flower v. Barnekoff*, 20 Or. 132, 25 Pac. 370, 11 L. R. A. 149; *Everhart's Appeal*, 106 Pa. 349; *Davenport v. Buchanan*, 6 S. D. 376, 61 N. W. 47; *BRUCE v. HASTINGS*, 41 Vt. 380, 98 Am. Dec. 592, *Gilmore, Cas. Partnership*, 71; *Case v. Seger*, 4 Wash. St. 492, 30 Pac. 646; *Treat v. Hiles*, 68 Wis. 344, 32 N. W. 517, 60 Am. Rep. 858. See "*Frauds, Statute of*," *Dec. Dig. (Key No.)* § 76; *Cent. Dig.* §§ 135-139.

<sup>81</sup> "The question of partnership must be tried as a fact, and as if there was an issue upon it. If by facts and circumstances it is established as a fact that these persons were partners in the colliery, in which land was necessary to carry on the trade, the lease goes as an incident. The partnership being established by evidence upon which a partnership may be found, the premises necessary for the purposes of that partnership are by operation of law held for the purposes of that partnership." *Forster v. Hale*, 5 Ves. 300.

"An agreement to form a partnership for the purpose of buying and selling land may be proved by parol; it may then be shown by parol that certain land has been bought for the purpose of the partnership, and consequently that the plaintiff is entitled to the profits obtained by its resale." *Dale v. Hamilton*, 5 Hare, 360.

The leading case opposed to *Dale v. Hamilton*, supra, and *Forster v. Hale*, supra, and antedating the former, is *Smith v. Burnham*, 3 Sumn. 435, Fed. Cas. No. 13,019. See "*Partnership*," *Dec. Dig. (Key No.)* §§ 45-50; *Cent. Dig.* §§ 64-74; "*Frauds, Statute of*," *Dec. Dig. (Key No.)* §§ 44, 49, 56; *Cent. Dig.* §§ 66, 74, 136-138.

trust in favor of his copartners, is not at all satisfactorily discussed by the authorities. Apparently the rule has a wider significance and is applied to cases not falling within the doctrine of trusts.<sup>52</sup>

<sup>52</sup> "The result of the cases we have been considering upon this subject of the effect of a parol partnership upon the title to lands acquired and used for partnership purposes is that, the fact of partnership being proved, whether by articles or by parol, real estate acquired and used for the partnership purposes becomes, as between the partners, and for all purposes of adjustment of claims against the firm or its members, partnership assets; that in cases where the title to the land is in the partners as joint tenants the right of survivorship incident to that tenancy does not exist; and that where the title is in one, or some number less than the whole, of the partners, it is for the purposes above named divested, and becomes vested in all the partners by partnership title; and this whether the land was purchased with the money of the firm (creating a resulting trust to the firm) or with the money of the partner taking the title; and that it is not material whether the partnership was already established and engaged in its business when the land was acquired and brought into the stock, or whether it was established and the land acquired and put in contemporaneously, or whether the partnership was established for the purposes of some other trade or business, or for the special purpose of dealing in and making profit out of the very land itself which is in question. The whole doctrine (unless it can stand as an application of the law of implied trusts to cases of land purchased and held by one partner in derogation of his fiduciary obligation to the other) must be regarded as a bald exception to the rule that no oral agreement can be made available directly or indirectly to effect or compel the transfer of any interest in land. It has been severely criticised, and strenuous efforts have been made to stop it half way by limiting it to cases of a partnership already formed for and engaged in business, as distinguished from a partnership formed and the land acquired in pursuance of one and the same verbal agreement, or to cases of a partnership for general purposes to which the holding and use of the land was incidental, as distinguished from a partnership formed for the special purpose of dealing in the land. On principle, the doctrine of *Forster v. Hale*, that, on parol proof of a partnership existing and doing business, land used by the firm for the purpose of that business is assets of the firm, however the paper title may stand, seems to admit of no such limitations. And the cases which assert them do not deal at all, or do not appear to deal satisfactorily, with that question." *Browne, Stat. Frauds* (5th Ed.) § 281a. See "*Trusts*," *Dec. Dig.* (Key No.) § 84; *Cent. Dig.* § 127; "*Partnership*," *Cent. Dig.* § 103.

Where resulting trusts are not prohibited by statute, oral evidence may be used to show that lands acquired with partnership funds after the formation of the firm are held subject to firm purposes. Many of the cases cited in the footnotes involve the application of the doctrine of resulting trusts to after-acquired real estate with partnership funds. Again, it is said that real estate is treated and administered in equity as personal property for all the purposes of the partnership. A court of equity, having full jurisdiction of all cases between partners touching the partnership property, will inquire into, take an account of, and administer all the partnership property, whether it be real or personal, and in such cases will not allow a partner to commit a fraud or breach of trust upon the copartner by taking advantage of the statute.\*\*

### SAME—SUBJECT-MATTER

29. The subject-matter of a contract of partnership invariably involves the prosecution of a business for profit.

#### *Gain the Object of Partnership*

It cannot be said that the creation of a partnership is the subject-matter of a contract of partnership, for the partnership relation is only the result of the agreement to prosecute a business jointly, and to share profits and losses. The real subject-matter is the purpose which the parties have in mind when they contract together, and that invariably

\*\* CHESTER et al. v. DICKERSON, 54 N. Y. 1, 18 Am. Rep. 550, Gilmore, Cas. Partnership, 136; Flower v. Barnekoff, 20 Or. 132, 25 Pac. 370, 11 L. R. A. 149; Essex v. Essex, 20 Beav. 442, 440; Selkrig v. Davies, 2 Dow. P. C. 230; Crawshay v. Maule, 1 Swanst. 495. MARSH v. DAVIS, 33 Kan. 326, 6 Pac. 612, Gilmore, Cas. Partnership, 133; Richards v. Grinnell, 63 Iowa, 44, 18 N. W. 668, 50 Am. Rep. 727; Bates v. Babcock, 95 Cal. 479, 30 Pac. 605, 16 L. R. A. 745, 29 Am. St. Rep. 133; Speyer v. Desjardins, 144 Ill. 641, 32 N. E. 283, 36 Am. St. Rep. 473. See "Trusts," Dec. Dig. (Key No.) § 84; Cent. Dig. § 127; "Partnership," Dec. Dig. (Key No.) § 68; Cent. Dig. §§ 108, 523; "Frauds, Statute of," Dec. Dig. (Key No.) § 76; Cent. Dig. §§ 135-139.

involved the idea of a business for profit. The contemplation of profits inheres in the very definition of a partnership.<sup>84</sup>

*Societies Not Having Gain for Their Object*

Societies and clubs, the object of which is not to share profits, are not partnerships; nor are their members, as such, liable for each others' acts.<sup>85</sup> If liabilities are to be fastened on any of their members, it must be by reason of the acts of those members themselves,<sup>86</sup> or by reason of the acts of their agents; and the agency must be made out by the person who relies upon it, for none is implied by the mere fact of association.<sup>87</sup>

*What Business Enterprises may be the Subject of a Partnership Agreement*

While partnerships originally related only to trade and commerce, they may extend to all callings and professions. Any enterprise proper for an individual to engage in for the purpose of enjoying the profits of it may as properly be pursued by a partnership for a like purpose, whether the occupation be mining, farming, or the practice of law or medicine. At one time the impression prevailed that a partnership could not validly be formed for the purpose of dealing in real estate; but, under the modern decisions, real estate forms no exception to the rule stated above.<sup>88</sup>

<sup>84</sup> *Lafond v. Deems*, 81 N. Y. 507; *McCabe v. Goodfellow*, 133 N. Y. 89, 30 N. E. 728, 17 L. R. A. 204; *Danbury Cornet Band v. Bean*, 54 N. H. 524; *State ex rel. Hadley v. Kansas City Live Stock Exch.*, 211 Mo. 181, 109 S. W. 675, 124 Am. St. Rep. 776.

Farmers' telephone company, organized merely for convenience of its members, is not a partnership. *Meinhart v. Draper*, 133 Mo. App. 50, 112 S. W. 709. See "Partnership," *Dec. Dig. (Key No.)* §§ 1, 4-13; *Cent. Dig.* §§ 15-28.

<sup>85</sup> *Teed v. Parsons*, 202 Ill. 455, 66 N. E. 1044 (religious society); *Reg. v. Robson*, 16 Q. B. Div. 137 (Young Men's Christian Association). See chapter I, § 15, p. 44, "Organizations Not for Profit." See "Partnership," *Dec. Dig. (Key No.)* §§ 1, 3-13; *Cent. Dig.* §§ 13-28.

<sup>86</sup> As in *Cross v. Williams*, 7 Hurl. & N. 675, where the commandant of a rifle corps was held liable for uniforms he had ordered. See "Associations," *Dec. Dig. (Key No.)* § 16; *Cent. Dig.* §§ 26-28; "Clubs," *Dec. Dig.* § 11; *Cent. Dig.* § 7.

<sup>87</sup> See ante, chapter I, § 15, p. 44.

<sup>88</sup> *CHESTER v. DICKERSON*, 54 N. Y. 1, 13 Am. Rep. 550, Gil-

### SAME—LEGALITY OF OBJECT

30. A partnership cannot be formed to carry on a business which is unlawful or opposed to public policy.

#### *What Partnerships are Illegal*

In order that a partnership may result from a contract, the contract must be legal. Illegality, however, will not be presumed, but must plainly appear to enter into the essence of the contract. An agreement is illegal where its performance involves either (1) the violation of a positive law, or (2) where it is opposed to public policy.

The following are illustrations of partnerships illegal because involving the violation of positive law: Partnerships formed for the purpose of deriving profit from a criminal offense, such as smuggling, gambling, robbery, theft, and the like.<sup>89</sup> So, where a statute prohibits unqualified persons from carrying on certain trades or business, a partnership between unqualified persons for the purpose of carrying on such a business would be illegal. But the mere fact that one or more members of such a partnership are disqualified will not render the partnership illegal, if the business is in fact carried on by persons duly qualified. There is no presumption that the disqualified one was to perform any part of the duties for which he was disqualified.<sup>90</sup>

more, *Cas. Partnership*, 136, and cases there cited; *Flower v. Barnekoff*, 20 Or. 137, 25 P. 370, 11 L. R. A. 149. See "*Partnership*," *Dec. Dig. (Key No.)* § 15; *Cent. Dig.* § 2; "*Frauds, Statute of*," *Dec. Dig. (Key No.)* § 76; *Cent. Dig.* §§ 135-139.

<sup>89</sup> *CENTRAL TRUST & SAFE DEPOSIT CO. v. RESPASS*, 112 Ky. 606, 66 S. W. 421, 56 L. R. A. 479, 99 Am. St. Rep. 317, *Gilmore, Cas. Partnership*, 139; *Smith v. Richmond*, 114 Ky. 303, 70 S. W. 846, 102 Am. St. Rep. 283; *Craft v. McCounoughy*, 79 Ill. 346, 22 Am. Rep. 171; *Davis v. Gelhaus*, 44 Ohio St. 69, 4 N. E. 593. A partnership in breeding, training, and racing horses for purses is legal. *CENTRAL TRUST & SAFE DEPOSIT CO. v. RESPASS*, *supra*. See "*Partnership*," *Dec. Dig. (Key No.)* § 26; *Cent. Dig.* § 12; "*Gaming*," *Dec. Dig. (Key No.)* § 17; *Cent. Dig.* § 33.

<sup>90</sup> *Williams v. Jones*, 5 Barn. & C. 108; *Harland v. Lillenthal*, 53 N. Y. 438. Where a statute prohibits a lawyer or a physician not

A partnership may also be illegal upon the general ground that it is formed for a purpose forbidden by the current notions of morality or public policy. A partnership, for example, formed for the purpose of deriving profit from the sale of obscene prints, or for the procurement of marriages, or of public offices of trust, would be undoubtedly illegal.<sup>91</sup> We have already seen that partnerships between citizens of one country and alien enemies are illegal.<sup>92</sup> So, also, are partnerships between persons resident in this country for the purpose of trading with an enemy's country.<sup>93</sup> But a partnership in this country for running the blockade established by one belligerent nation in the ports of another is not illegal; for, subject to the risk of capture, a neutral may lawfully trade with a belligerent.<sup>94</sup> Public policy does not permit of a partnership in a public office.<sup>95</sup>

licensed from practicing, a partnership between him and a licensed practitioner is not illegal, if his share of the profits is not in consideration of his practicing. *Scott v. Miller*, Johns. Eng. Ch. 220. But a sheriff who is forbidden to buy county scrip cannot do it indirectly by forming a partnership for that purpose. *Read v. Smith*, 60 Tex. 379. See "*Partnership*," *Dec. Dig. (Key No.)* § 16; "*Attorney and Client*," *Dec. Dig. (Key No.)* § 30; *Cent. Dig.* § 43.

<sup>91</sup> *Sterry v. Clifton*, 9 C. B. 110 (sale of offices); *Pare v. Clegg*, 29 Beav. 589, and *Thornton v. Haw*, 8 Jur. (N. S.) 663 (associations for promulgating irreligious opinions). See "*Partnership*," *Dec. Dig. (Key No.)* § 26; *Cent. Dig.* § 12.

<sup>92</sup> See chapter II, § 24, "Aliens."

<sup>93</sup> Generally, as to effect of war, see *Prize Cases*, 2 Black, 635, 17 L. Ed. 459; *The Cheshire*, 3 Wall. 231, 18 L. Ed. 175; also *Evans v. Richardson*, 3 Mer. 469; *Snell v. Dwight*, 120 Mass. 9; *Dunham v. Presby*, Id. 285. See "*Partnership*," *Dec. Dig. (Key No.)* §§ 26, 268; *Cent. Dig.* §§ 12, 612.

<sup>94</sup> *Ex parte Chavassee*, 4 De Gex, J. & S. 655; *The Helen*, L. R. 1 Adm. & Ecc. 1. See "*Partnership*," *Dec. Dig. (Key No.)* § 26; *Cent. Dig.* § 12; "*Contracts*," *Dec. Dig. (Key No.)* § 133; *Cent. Dig.* §§ 662-680.

<sup>95</sup> *Jons v. Perchard*, 2 Esp. 507 (sheriff); *Gaston v. Drake*, 14 Nev. 175, 33 Am. Rep. 548 (prosecuting attorney); *Forsyth v. Woods*, 11 Wall. 484, 20 L. Ed. 207; *Seely's Adm'r v. Beck*, 42 Mo. 143; *Bowen v. Richardson*, 133 Mass. 293 (executor or administrator); *Wollcott v. Gibson*, 51 Ill. 69; *Hobbs v. McLean*, 117 U. S. 567, 6 Sup. Ct. 870, 29 L. Ed. 940; *Warner v. Griswold*, 8 Wend. (N. Y.) 665; *Gould v. Kendall*, 15 Neb. 549, 19 N. W. 483. On partnerships for the purpose of bidding on public lands, and stifling competition, see *Platt v.*

A combination of manufacturers and dealers, formed solely to enhance the price of articles manufactured and dealt in, cannot sue in the name adopted by it as a partnership, for such a partnership is illegal.<sup>96</sup>

*Same—Effect of Illegality*

The law will not interfere between the members of an illegal partnership to compel an accounting or settlement of the partnership affairs.<sup>97</sup> It leaves the parties where it finds them, and will not enforce either a division of the profits or contribution for losses. Even if an agreement for an illegal partnership has been partly performed, the law will not enforce it.<sup>98</sup> In order, however, that illegality may be a defense, it must affect the contract on which the plaintiff is compelled to rely in order to make out his right. He may recover, if the obligation in which he sues is sup-

Oliver, 2 McLean, 267, Fed. Cas. No. 11,115; King v. Winants, 71 N. C. 469, 17 Am. Rep. 11; Hunter v. Pfeiffer, 108 Ind. 197, 9 N. E. 124. See "Partnership," Dec. Dig. (Key No.) § 26; Cent. Dig. § 12; "Contracts," Dec. Dig. (Key No.) §§ 119, 124; Cent. Dig. §§ 581, 654-657.

<sup>96</sup> Jackson v. Akron Brick Ass'n, 53 Ohio St. 303, 41 N. E. 257, 35 L. R. A. 287, 53 Am. St. Rep. 638. See "Partnership," Dec. Dig. (Key No.) § 26; Cent. Dig. § 12.

<sup>97</sup> CENTRAL TRUST & SAFE DEPOSIT CO. v. RESPASS, 112 Ky. 606, 66 S. W. 421, 56 L. R. A. 479, 99 Am. St. Rep. 317, Gilmore, Cas. Partnership, 139. See note, 99 Am. St. Rep. 326, "Accounting by Illegal Partnership." See, also, Craft v. McConoughy, 79 Ill. 346, 22 Am. Rep. 171; Snell v. Dwight, 120 Mass. 9; Fairbank v. Leary, 40 Wis. 637; Planters' Bank v. Union Bank, 16 Wall. 483, 21 L. Ed. 473. If part of the business only is illegal, and is separable, the partnership is not wholly void, and the court may settle the legal part. Wishek v. Hammond, 10 N. D. 72, 84 N. W. 587; Anderson v. Powell, 44 Iowa, 20. See "Equity," Dec. Dig. (Key No.) § 25; Cent. Dig. § 79; "Gaming," Dec. Dig. (Key No.) § 17; Cent. Dig. § 33; "Contracts," Cent. Dig. § 693.

<sup>98</sup> Ewing v. Osbaldiston, 2 Mylne & C. 53.

No action lies to recover a premium agreed to be paid by defendant in consideration of being admitted to an illegal partnership. Williams v. Jones, 5 Barn. & C. 108. Accounting not allowed of lottery business. Smith v. Richmond, 114 Ky. 303, 70 S. W. 846, 102 Am. St. Rep. 283. See "Partnership," Dec. Dig. (Key No.) § 304; Cent. Dig. §§ 701, 702; "Contracts," Dec. Dig. (Key No.) § 133; "Equity," Dec. Dig. (Key No.) § 25; Cent. Dig. § 80.

ported by an independent consideration, although indirectly connected with the illegal partnership.<sup>99</sup> In short, the cases may be summarized as holding that no accounting will be granted in the case of an illegal partnership, but that, if the origin of the fund is foreign to the controversy, the property being at present invested in a legal business, accounting may be had, and that if the parties to an illegal partnership waive the illegality, and themselves state their accounts, no one else may object to the accounting.<sup>1</sup>

### CLASSIFICATION OF PARTNERSHIPS

31. Partnerships may be divided, in respect to the nature of the association, into

- (a) Ordinary partnerships (p. 104).
- (b) Limited partnerships (p. 105).
- (c) Joint-stock companies (p. 105).
- (d) Subpartnerships (p. 106).
- (e) Mining partnerships (p. 107).

<sup>99</sup> "Two men enter into a conspiracy to rob on the highway, and they do rob, and while one is holding the traveler the other rifles his pocket of \$1,000, and then refuses to divide, and the other files a bill to settle up the partnership, when they go into all the wicked details of the conspiracy and the rencounter and the treachery. Will a court of justice hear them? No case can be found where a court has allowed itself to be so abased. Now if the robbers had taken the \$1,000 and invested it in some legitimate business as partners, and had afterwards sought the aid of the court to settle up that legitimate business, the court would not have gone back to inquire how they first got the money; that would have been a past transaction, not necessary to be mentioned in the settlement of the new business." *King v. Winants*, 71 N. C. 473, 17 Am. St. Rep. 11. See, also, *Armstrong v. American Exch. Nat. Bank*, 150 U. S. 433, 10 Sup. Ct. 450, 33 L. Ed. 747; *Woodworth v. Bennett*, 43 N. Y. 273, 3 Am. Rep. 706. See "*Contracts*," *Dec. Dig. (Key No.)* §§ 139, 140; *Cent. Dig.* §§ 693, 713-721.

<sup>1</sup> *Woodworth v. Bennett*, 43 N. Y. 273, 3 Am. Rep. 706; *CENTRAL TRUST & SAFE DEPOSIT CO v. RESPASS*, 112 Ky. 606, 66 S. W. 421, 56 L. R. A. 479, 90 Am. St. Rep. 317, *Gillmore, Cas. Partnership*, 139. See "*Contracts*," *Dec. Dig. (Key No.)* §§ 139, 140; *Cent. Dig.* §§ 693, 713-721; "*Gaming*," *Dec. Dig. (Key No.)* § 17; *Cent. Dig.* § 33.

### SAME—ORDINARY PARTNERSHIPS

32. Ordinary partnerships may be divided, in respect to their extent, into universal, general, and special or particular, partnerships.

#### *Ordinary Partnerships—Universal, General, and Special or Particular*

A universal partnership is one where the parties agree to bring into the firm all of their property, of whatever description, and to employ all their skill, labor, and services in the business of that partnership for their mutual benefit.<sup>2</sup> While theoretically possible, such partnerships are practically never found.<sup>3</sup> A general partnership is one where the partners agree to join in all transactions of a particular class of more or less permanency, such as a partnership in banking, merchandising, or contracting. A special partnership, on the other hand, contemplates association in only a single venture.<sup>4</sup>

<sup>2</sup> See Story, Partnership, p. 71.

<sup>3</sup> But, as approaching them, see *Gray v. Palmer*, 9 Cal. 616; *Clasely v. Separatist's Society of Zoar*, 13 Ohio St. 144; *Goesele v. Bimeler*, 14 How. 589, 14 L. Ed. 554; *Lyman v. Lyman*, 2 Paine, 11, Fed. Cas. No. 8,628; *Houston v. Stanton*, 11 Ala. 412; *Baker v. Nahrtrieb*, 19 How. 126, 15 L. Ed. 528; *Rice v. Barnard*, 20 Vt. 479, 50 Am. Dec. 54; *Hamilton v. Halpin*, 68 Miss. 99, 8 South. 739; *United States Bank v. Binney*, 5 Mason, 176, 183, Fed. Cas. No. 16,791. See, also, *Fuller v. Ferguson*, 26 Cal. 546, for the relation analogous to universal partnerships which the Mexican law in force in California before its cession created between husband and wife. See "Partnership," *Dec. Dig. (Key No.)* §§ 1-43, 65; *Cent. Dig.* §§ 1-60, 92, 93½.

<sup>4</sup> There is much confusion in the use of the terms, and there is no particular advantage in such classification. The scope of a partnership business and the rights and liabilities of the participants must be determined by the facts of each particular case. Cf. *Mechem*, Partn. Eq. 15; *Bates*, Partn. Eq. 12; *T. Pars. Partn. Eq.* 40; *Story*, Partn. Eq. 75; *Bates*, Tim. Partn. Eq. 1; *Shumaker*, Partn. Eq. 42, 43.

### SAME—LIMITED PARTNERSHIPS

33. Limited partnerships are those in which the liabilities of some of the partners are limited to specified amounts.

Limited partnerships exist solely by virtue of statutes, which allow the liabilities of some of the partners to bear losses to be restricted to a defined amount. The distinguishing feature is the absence of the common-law liability of each partner for the full amount of the partnership debts.\*

### SAME—JOINT-STOCK COMPANIES

34. A joint-stock company is a partnership with a capital divided into transferable shares.

Where, in America, persons form corporations in extensive business enterprises in order to avoid their individual liability for all the debts of the association, in England it is more common to resort to the formation of a joint-stock company. The business management of these companies is committed to a board of directors, the capital is divided into shares, and the shares are freely assignable, as in corporations. The provisions of the joint-stock companies' acts, and the memorandum and articles of association, control. When these are silent, the members are individually liable for all the debts of the company, as are the members of an ordinary partnership.\*

The absence of the *delectus personarum*, the limited liability, and the assignability of the shares are the distinguishing features of these associations.

\* See post, chapter XI, p. 592.

\* 25 & 26 Vict. c. 89; 30 & 31 Vict. c. 131. See, also, *Laws N. Y.* 1881, c. 599; Shumaker, *Partn.* 11, 290.

### SAME—SUBPARTNERSHIPS

35. A contract between a partner and a third person to share the former's proportion of the profits does not make such third person a member of the partnership, but creates a subpartnership, provided the other requisites of a partnership agreement are present.

We have already seen that the principle of *delectus personarum* does not apply to a subpartnership, for this is merely a partnership within the main partnership, of which it is independent.<sup>7</sup> "I take it," says Lord Eldon, "to have long since been established that a man may become partner with A., where A. and B. are partners, and yet not be a member of that partnership which exists between A. and B."<sup>8</sup> A. may agree to divide the profits of his partnership with B. with the stranger, but the latter thereby acquires no standing whatever in the original firm, and is not entitled to any share of its profits as such. With A. alone is he privy.<sup>9</sup>

<sup>7</sup> See ante, chapter II, § 22, p. 74; *BURNETT v. SNYDER*, 76 N. Y. 344, *Gilmore, Cas. Partnership*, 117; *Setzer v. Beale*, 19 W. Va. 274. See "*Partnership*," *Dec. Dig. (Key No.)* §§ 18, 23, 29; *Cent. Dig.* §§ 4, 9, 33, 475.

<sup>8</sup> Ex parte *Barrow*, 2 Rose, 252, 254; *Nirdlinger v. Bernheimer*, 133 N. Y. 45, 30 N. E. 561; *Morrison v. Dickey*, 122 Ga. 353, 50 S. E. 175, 69 L. R. A. 87 (1905). See "*Partnership*," *Dec. Dig. (Key No.)* §§ 18, 23, 29; *Cent. Dig.* §§ 4, 9, 33.

<sup>9</sup> Note that since the decision of *COX v. HICKMAN*, 8 H. L. Cas. 268, *Gilmore, Cas. Partnership*, 31, the participation of the subpartner in the profits of the principal firm does not render him liable to its creditors, as he would have been under *WAUGH v. CARVER*, 2 H. Bl. 235, *Gilmore, Cas. Partnership*, 19. See chapter I, §§ 5, 6, 7. See "*Partnership*," *Dec. Dig. (Key No.)* §§ 18, 23, 30; *Cent. Dig.* §§ 4, 9, 33-43.

## SAME—MINING PARTNERSHIPS

36. Where tenants in common of a mine work it together, but divide the profits in proportion to their interests, they are mining partners.

Mining partnerships are a cross between tenancies in common and partnerships proper.<sup>10</sup> Their chief peculiarity is the absence of the *delectus personarum*, the essential element of a strict partnership. Moreover, the shares of a mining partnership may be assigned *ad libitum*. The death of a partner, or his retiring from the firm, does not dissolve the partnership.<sup>11</sup> However, there is nothing to prevent the partners in a mining operation from forming a strict partnership, if they wish it, and when it appears that the confidential relation—the *delectus personæ*—is established, and the firm is not subject to the intrusion of other partners at will, the ordinary incidents of partnership attach.<sup>12</sup>

## SAME—TRADING AND NONTRADING PARTNERSHIPS

37. Partnerships are also divided, in respect to their business, into trading and nontrading.
38. Trading partnerships are those in the conduct of whose business there is contemplated the periodical or continuous buying and selling of mercantile commodities.

<sup>10</sup> *Nolan v. Lovelock*, 1 Mont. 224. See "*Mines and Minerals*," *Dec. Dig. (Key No.)* §§ 96-100; *Cent. Dig.* §§ 222-225.

<sup>11</sup> *Kahn v. Central Smelting Co.* (1880) 102 U. S. 641, 28 L. Ed. 266, *Gilmore, Cas. Partnership*, 120, note; *Blackmarr v. Williamson*, 57 W. Va. 249, 50 S. E. 254. See "*Partnership*," *Dec. Dig. (Key No.)* §§ 96-100; *Cent. Dig.* §§ 222-225.

<sup>12</sup> *Decker v. Howell*, 42 Cal. 636. See "*Mines and Minerals*," *Dec. Dig. (Key No.)* § 97; *Cent. Dig.* § 222.

*Trading and Nontrading Partnerships*

Partnerships are usually classified, on the basis of the nature of the business, into trading or commercial partnerships and nontrading partnerships. The significance of the classification lies in the fact that the scope of each partner's power to act as agent for his copartners is usually much broader in the former class than in the latter. For example, in a trading firm each partner has implied power to borrow money and issue therefor negotiable paper, while in a nontrading firm no such implied power exists.<sup>13</sup> The classification is quite generally recognized by the courts and is of importance in ascertaining the scope of a partner's power.<sup>14</sup>

*Same—Trading and Nontrading Firms Defined*

A trading firm is one in the conduct of whose business there is contemplated the periodical or continuous buying and selling of mercantile commodities. "The test of the character of a partnership is buying and selling. If it buys and sells, it is a commercial or trading; if it does not buy or sell, it is one of employment or occupation."<sup>15</sup> It is a trading firm if the conduct of its business "so involves buying or selling, whether incidentally or otherwise, that it naturally comprehends the employment of capital, credit, and the usual instrumentalities of trade, and frequent contact with the commercial world in dealings which in their

<sup>13</sup> *PEASE v. COLE*, 53 Conn. 53, 22 Atl. 681, 55 Am. Rep. 53, Gilmore, Cas. Partnership, 372; *Smith v. Sloan*, 37 Wis. 285, 19 Am. Rep. 757; *HEDLEY v. BAINBRIDGE*, 3 Q. D. 316, 2 G. & D. 483, 11 L. J. Q. B. 293, Gilmore, Cas. Partnership, 371. For further discussion, see chapter V, § 93, p. 286, "Powers of Partners." See "Partnership," *Dec. Dig. (Key No.)* § 146; *Cent. Dig.* § 244.

<sup>14</sup> *Marsh, Merwin & Lemon v. Wheeler*, 77 Conn. 449, 57 Atl. 410, 107 Am. St. Rep. 40; *Lee v. First Nat. Bank of Ft. Scott*, 45 Kan. 8, 25 Pac. 196, 11 L. R. A. 238; *WINSHIP v. BANK OF UNITED STATES*, 5 Pet. 529, 561, 8 L. Ed. 216, Gilmore, Cas. Partnership, 356. But see, contra, *Hoskinson v. Elliot*, 62 Pa. 393. See "Partnership," *Dec. Dig. (Key No.)* § 146; *Cent. Dig.* §§ 242-255.

<sup>15</sup> *Lee v. First Nat. Bank of Ft. Scott*, 45 Kan. 8, 25 Pac. 196, 11 L. R. A. 238; *Kimbrow v. Bullitt*, 22 How. 256, 268, 16 L. Ed. 313. See "Partnership," *Dec. Dig. (Key No.)* §§ 125-164; *Cent. Dig.* §§ 190-300.

character and incidents are like those of traders generally."<sup>16</sup>

While the distinction between trading and nontrading firms is recognized, it is not always easy to draw the line. The courts have judicially declared certain partnerships to be in trade,<sup>17</sup> and others not to be in trade.<sup>18</sup> Doubtful cases are to be dealt with according to their facts, and the question of the extent of the partner's power should be submitted to the jury. "While, on the authorities, it may not be very difficult, in many cases, to hold, as a matter of law, that the scope of the business carried on by a certain firm renders it a trading partnership, with a power or authority

<sup>16</sup> *Marsh, Merwin & Lemon v. Wheeler*, 77 Conn. 449, 454, 59 Atl. 410, 412, 107 Am. St. Rep. 40. In *PHILLIPS v. STANZELL* (Tex. Civ. App.) 28 S. W. 900, the court quotes with approval the following definition from *Bates*, Partn. § 327: "If the partnership contemplates the periodical or continuous or frequent purchasing, not as an incident to an occupation, but for the purpose of selling again the thing purchased, either in its original or manufactured state, it is a trading partnership; otherwise, it is not." See "*Partnership*," *Dec. Dig. (Key No.)* §§ 125-164; *Cent. Dig.* §§ 190-300.

<sup>17</sup> Generally, all partnerships engaged in carrying on mercantile business in the ordinary way have been held to be in trade. *Smith v. Collins*, 115 Mass. 388; *Wagner v. Simmons*, 61 Ala. 143; *Gano v. Samuel*, 14 Ohio, 592; *Dow v. Moore*, 47 N. H. 419; *Walsh v. Lennon*, 98 Ill. 27, 38 Am. Rep. 75.

Likewise firms manufacturing commodities for sale are in trade. *WINSHIP v. BANK OF UNITED STATES*, 5 Pet. 629, 8 L. Ed. 216; *Gilmore, Cas. Partnership*, 356; *Holt v. Simmons*, 16 Mo. App. 97; *Cowand v. Pulley*, 11 La. Ann. 1; *Hoskinson v. Elliot*, 62 Pa. 393. See "*Partnership*," *Dec. Dig. (Key No.)* §§ 125-164; *Cent. Dig.* §§ 190-300.

<sup>18</sup> *Smith v. Sloan*, 37 Wis. 285, 19 Am. Rep. 757 (attorneys); *Third Nat. Bank v. Snyder*, 10 Mo. App. 211 (brokers); *Kimbrow v. Bullitt*, 22 How. 256, 16 L. Ed. 313 (farmers and planters); *Levi v. Latham*, 15 Neb. 509, 19 N. W. 460, 48 Am. Rep. 361 (livery men); *Schele v. Wagner*, 163 Ind. 20, 71 N. E. 127 (money lenders and insurance agents); *Horn v. Newton City Bank*, 32 Kan. 518, 4 Pac. 1022 (operators of threshing machines); *PEASE v. COLE*, 53 Conn. 53, 22 Atl. 681, 55 Am. Rep. 53, *Gilmore, Cas. Partnership*, 372 (theater managers); *Deardorf's Adm'r v. Thacher*, 78 Mo. 128, 47 Am. Rep. 95 (real estate agents); *Third Nat. Bank of Sedalia v. D. A. Faults & Co.*, 115 Mo. App. 42, 90 S. W. 755 (contractors carrying government mail). See "*Partnership*," *Dec. Dig. (Key No.)* §§ 125-164; *Cent. Dig.* §§ 190-300.

resting in each partner to borrow money for the use of the firm, and to execute and deliver negotiable paper therefor, or to hold, as a matter of law, that the firm business constitutes it nothing but a nontrading partnership, in which the partners have, prima facie, no authority to borrow money, or to bind the concern by a promissory note, there are many partnerships concerning which no rule of law as to the implied powers of the partners with respect to firm notes can be applied with safety. In these cases the authority of either partner in this respect must be determined as a question of fact, depending upon circumstances peculiar to each. Certain it is, from the nature of the business conducted by defendant firm, that the court below could not hold, as a matter of law, that it was a trading partnership, and hence that each partner had implied authority to borrow money for its use, and to execute and deliver a firm note for the same."<sup>19</sup>

### CLASSIFICATION OF PARTNERS

39. Partners have been divided into various classes, such as:

- (a) General.
- (b) Special.
- (c) Ostensible.
- (d) Secret.
- (e) Silent.
- (f) Dormant.
- (g) Nominal.

#### *General and Special Partners*

A general partner being one whose liability for partnership debts is unlimited, the term has no significance as applied to members of ordinary partnerships, who are necessarily all general partners. It is used merely to distinguish the one or more members of a limited partnership who are

<sup>19</sup> VETSCH v. NEISS et al., 66 Minn. 459, 69 N. W. 315, Gilmore, Cas. Partnership, 379. See "Partnership," Dec. Dig. (Key No.) § 218.

not special partners; that is, whose liability is not limited to a defined amount, as is that of the special partners. In a limited partnership there must always be one or more general partners, as well as one or more special partners.<sup>20</sup>

#### *Ostensible Partners*

An ostensible partner is one whose connection with the firm is openly avowed, either by means of the firm sign or otherwise.

#### *Secret Partners*

A secret partner, on the other hand, is one whose connection with the firm is concealed, or at least is not announced or made known to the public.<sup>21</sup>

#### *Silent Partners*

A silent partner, while having his right to a share of the firm profits, has no voice in the management of the partnership business. This restriction placed upon his power by the mutual agreement of the partners will not, however, be allowed to work to the detriment of a third person, deeming himself, upon good grounds of belief, in dealing with a partner, to be dealing with the firm.<sup>22</sup>

#### *Dormant Partners*

A dormant partner combines in himself the characteristics of both the secret and the silent partner. Although his identity may be a secret, and he may not transact any of the business of the firm, he still maintains the relation of principal to his agent, the fellow partner. This distinguishes him from the mere sharer of profits, who, since *Cox v. Hickman*, has had no partnership liability.<sup>23</sup> Once the secret of his existence is disclosed, the dormant partner, like the undisclosed principal in the law of agency, is held

<sup>20</sup> See post, chapter XI, p. 592, "Limited Partnerships."

<sup>21</sup> *Willard v. Bullen*, 41 Or. 25, 67 Pac. 924, 68 Pac. 422. See "Partnership," *Dec. Dig. (Key No.)* § 39; *Cent. Dig.* §§ 54, 55.

<sup>22</sup> As to what notice is sufficient to relieve the firm from liability for acts of a partner of restricted authority, see post, "Powers of Partners," chapter V, § 86 et seq., p. 278.

<sup>23</sup> *COX v. HICKMAN*, 8 H. L. Cas. 268, *Gillmore, Cas. Partnership*, 81. See "Partnership," *Dec. Dig. (Key No.)* § 39; *Cent. Dig.* §§ 54, 55.

to strict partnership liability, even where he has attempted to disguise himself as a mere lender.<sup>24</sup> He has this advantage, however: That so long as he is unknown he is protected by the rule that "a dormant partner may retire from the firm without giving notice to the world."<sup>25</sup>

#### *Nominal Partners*

A nominal partner is the expression used to designate a person who has acquired the name, with outside persons, of being a partner, without necessarily participating in the profits. Liability attaches to him by reason of his own act or negligence alone. Having courted liability for the firm's debts, he can generally be forced to pay them.<sup>26</sup>

<sup>24</sup> POOLEY v. DRIVER, 5 Ch. Div. 458; *Allen & Co. v. Davids*, 70 S. C. 280, 49 S. E. 846. See "Partnership," *Dec. Dig. (Key No.)* §§ 163, 164; *Cent. Dig.* §§ 296-300.

<sup>25</sup> CARTER v. WHALLEY, 1 Barn. & Adol. 11. Further discussion of the liability of dormant and secret partners will be found post, chapter IV, § 83, p. 285. See "Partnership," *Dec. Dig. (Key No.)* § 236; *Cent. Dig.* §§ 484-488.

<sup>26</sup> See ante, chapter I, § 25, "Partnership by Estoppel."

## CHAPTER III

### THE NATURE AND CHARACTERISTICS OF A PARTNERSHIP

- 40. Various Conceptions of a Partnership.
- 41-42. The Partnership Name.
- 43. Partnership Property.
- 44. What is Included in Partnership Property.
- 45-46. Partnership Capital.
- 47-48. Amount of Contribution.
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- 52. Title to Partnership Property—How Taken and Held.
- 53. Conversion of Partnership Realty into Personalty.
- 54. Extent of Conversion.
- 55. Nature and Extent of Partner's Interest in Partnership Property.
- 56-57. Transfer of Partnership Property—By Act of Partnership.
- 58. Firm Creditors' Rights in Firm Assets—Partner's Lien.
- 59. Change of Firm Property into Separate Property.
- 60-61. Use of Firm Property to Pay Separate Debts of Partners.
- 62. By Act of a Single Partner.
- 63. Form of Conveyance.
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- 65-66. Effect of Death of Partner on Partnership Property.
- 67. Surviving Partner as Quasi Trustee.
- 68. Agreement of Partners Controlling Property after Death of Partner.

### VARIOUS CONCEPTIONS OF A PARTNERSHIP

- 40. Whether a firm is a legal entity distinct from its members is a question on which there is diversity of opinion. By merchants and by the civil law a partnership is regarded as an entity; by the common law it is considered merely as an association of individuals.

#### *In General*

No one question in the law of partnership has produced more controversy, at least among text-writers, than the question as to the true nature of a partnership. It is de-

clared by one learned writer that: "It is certain that a partnership is neither a tenancy in common, nor a corporation; and it is equally certain that it has some of the attributes and qualities of each of these forms of joint ownership. The question, which lies at the bottom of the difficulties presented by our present topic, seems to us to be this: Which of these two things does partnership most nearly approach? \* \* \* A partnership is a legal body by itself. We do not say it is a corporation, because it wants some of the most essential elements of incorporation. But we say it is a body by itself, and is so recognized by the law for some purposes, and should be—always in a proper way, and to a proper degree—for all purposes."<sup>1</sup> But the above view is criticised by another writer in the following language: "What is the polarity of mind of a lawyer who advocates making a partnership by turns a corporation and a number of individuals? If he comprehended the elemental distinction of kind, he would not expose his confusion by making the suggestion; but he would disguise the proposition in the jargon of lawyers, who speak of a man quo modo a horse."<sup>2</sup> The author further insists that, if the fiction that the firm is a person had a legal basis for its existence, a partnership would become a corporation, and would be subject to the incidents of incorporation.

#### *The Mercantile Conception*

However we may regard a partnership, whether as a legal entity or as a collection of individuals combined for purposes of mutual profit, there is no doubt that according to the conception of merchants the firm is regarded as a distinct body from the individuals of which it is composed. Partnership bookkeeping is conducted as though the firm were a natural person, possessing rights and obligations of

<sup>1</sup> Parsons (Theophilus) on Partnership (4th Ed.) pp. 325, 328.

<sup>2</sup> Parsons (James) Principles of Partnership (1st Ed.) 287. Mr. Parsons' conception of a partnership is as follows: "The sum of the rights and duties of the partners in the relation is called the status of partnership. The status may be created by contract, like marriage or sale. The contract is the occasion or *dolor*, and the consummation or conveyance establishes rights in rem."

its own. Each partner is represented as a debtor to the firm for money or other property received by him from the common fund. He becomes a creditor of the firm for the amount of his contributions to that fund. In general, it may be said that, though they probably recognize generally the personal liability of partners,<sup>3</sup> business men are apt to conceive of a firm as distinct from its members. This distinction, thus made, is often recognized by the courts in the interpretation of mercantile contracts. Even though a court may not recognize the partnership as an entity, it will recognize the usage of business men in interpreting their contracts. Thus in *Bank of Buffalo v. Thompson*,<sup>4</sup> a mortgage was given by Thompson to the bank, conditioned for the payment of all notes, checks, or bills of exchange thereafter "made, drawn, indorsed, or accepted" by Thompson and discounted by the bank for his benefit, and also for the payment of "all sums of money which shall at any time be due or owing by him to said bank upon any account whatever." Subsequent to giving the mortgage Thompson formed a copartnership with three other persons. The bank, having discounted for the firm several notes made and indorsed by Thompson in the firm name, claimed that these were secured by the mortgage. In refusing to sustain the contention of the bank, the court said: "In ordinary commercial language the obligation of a firm would not be spoken of as the obligation of any one of its members, and a firm is regarded as an entity distinguished from all the individual members of which it is composed. \* \* \* This mortgage must be regarded as a commercial instrument, executed in commercial transactions, and must be construed as ordinary commercial men would understand the language used; and we think that among business men a distinction is made between the firm, as an

<sup>3</sup> Holmes, J., in *HALLOWELL v. BLACKSTONE NAT. BANK*, 154 Mass. 359, 28 N. E. 281, 13 L. R. A. 315, Gilmore, Cas. Partnership, 309. See "Partnership," *Dec. Dig. (Key No.)* § 63; *Cent. Dig.* § 93; "Pledges," *Cent. Dig.* § 61.

<sup>4</sup> *BANK OF BUFFALO v. THOMPSON*, 121 N. Y. 280, 24 N. E. 473, Gilmore, Cas. Partnership, 152. See "Partnership," *Dec. Dig. (Key No.)* § 63; *Cent. Dig.* § 93; "Mortgages," *Cent. Dig.* § 228.

entity, and the members who compose it, and that this language would not be understood as broad enough to cover the indebtedness of a firm of which Thompson was a member, and for whose debts, jointly with the other members of the firm, he could be made responsible." The court did not mean to say that it recognized a partnership as an entity. It merely took cognizance of the way in which those who had made a contract treated it, in order to give effect to their intention.<sup>5</sup>

The same rule has been applied in the interpretation of statutes relating to commercial transactions. In an Ohio case an attempt was made to recover statutory damages on a protested bill "drawn on persons without the state." The bill was drawn in Cincinnati on "Taylor & Cassily, New Orleans." Taylor and Cassily were partners in trade, having branches both in New Orleans and Cincinnati; Taylor living in New Orleans and Cassily in Cincinnati. The business of each branch was kept distinct, and each kept accounts with the other as with customers generally. In construing the statute to apply to this bill, the court said: "It can hardly be doubted that the terms, 'any person or persons, or body corporate,' as used in the statute, were intended to include all persons, natural or artificial, upon whom bills of exchange could properly be drawn. Can any good reason be assigned why mercantile firms, by whose agency so much of the commerce of the world is transacted, should be excluded from the operation of a statute designed to regulate commercial paper?"<sup>6</sup> In another case it was held, under a statute requiring a chattel mortgage to be filed where the owner of the property resided, or, in case of his nonresidence, where the property was located, that a filing of a chattel mortgage given by a firm, one of whose members was a nonresident, at the place where the resident partner resided and where the principal business of the firm was carried

<sup>5</sup> But see *HALLOWELL v. BLACKSTONE NAT. BANK*, 154 Mass. 359, 28 N. E. 281, 13 L. R. A. 315, Gilmore, *Cas. Partnership*, 309, where a contrary result was reached. See "*Pledges*," *Cent. Dig.* § 61.

<sup>6</sup> *WEST v. VALLEY BANK*, 6 Ohio St. 169, 172. See "*Bills and Notes*," *Cent. Dig.* § 34.

on, "should be considered a sufficient filing within the spirit of the statute." †

### *The Legal Conception*

The legal conception of a partnership is, however, very different from the commercial one. While the civil law regards a partnership as an entity,<sup>8</sup> the common law, in the language of the courts, at all events, rarely recognizes the partnership as distinct from the members of which it is composed.<sup>9</sup> They possess the rights and liabilities of the partnership. The obligations of the partnership may be satisfied out of their assets, and the death or retirement of any one of them terminates the partnership. Though statutes have made it possible in many instances to sue the part-

† HUBBARDSTON LUMBER CO. v. COVERT, 35 Mich. 255, Gilmore, Cas. Partnership, 148. See "*Chattel Mortgages*," *Cent. Dig.* § 164.

<sup>8</sup> Succession of PILCHER, 89 La. Ann. 362, 1 South. 929, Gilmore, Cas. Partnership, 148. "The partnership, once formed and put into action, becomes, in contemplation of law, a moral being, distinct from the persons who compose it. It is a civil person, which has its peculiar rights and attributes." Smith v. McMicken, 3 La. Ann. 322. See "*Partnership*," *Dec. Dig. (Key No.)* § 63; *Cent. Dig.* § 93.

<sup>9</sup> "It was not the lease of the firm, because there was no such thing as a firm known to the law." James, L. J., in *Ex parte CORBETT*, L. R. 14 Ch. D. 122, 128, Gilmore, Cas. Partnership, 146.

"In contemplation of law there is no merger or fusion of the several persons composing a partnership into a common or comprehensive person including them all. A firm adds nothing to population, and in this respect is unlike a corporation, which augments population in the legal, though not in the natural, world." Bleckley, C. J., in *DRUCKER v. WELLHOUSE*, 82 Ga. 129, 132, 8 S. E. 40, 42, 2 L. R. A. 328.

"A partnership is not a person, either natural or artificial." Bean, J., in *Adams v. Church*, 42 Or. 270, 272, 70 Pac. 1037, 1038, 59 L. R. A. 782, 95 Am. St. Rep. 740.

"A partnership cannot be considered as a person, in contradistinction to the persons composing it, simply because such is not its nature." Stayton, C. J., in *WIGGINS v. BLACKSHEAR*, 86 Tex. 665, 668, 28 S. W. 939, 940.

"Persons who have entered into partnership with one another are, for the purposes of this act, called collectively a firm, and the name under which their business is carried on is called the firm name." Partnership Act, 1890, § 4(1). See "*Partnership*," *Dec. Dig. (Key No.)* § 63; *Cent. Dig.* § 93.

ners in the name of the partnership, such statutes are procedural merely and do not change the essential nature of a partnership.<sup>10</sup> The same is true of statutes which permit the levying of taxes in the firm name, and the bringing of suit where the firm transacts business. The taxes, if not satisfied out of the firm assets, may be satisfied out of those of the individual partners, and the execution may be levied on the judgment against the property of the partners. The attitude of the courts towards the firm as a collection of individuals, and not as an entity, is illustrated in *Jones v. Blun*.<sup>11</sup> A statute forbade a corporation which had refused payment of its debts to transfer any of its property to any of its stockholders, directly or indirectly, in payment of a debt. A corporation of which Blun was a stockholder, having refused payment of its debts, transferred certain property to a firm of which Blun was a member. Though the same court had in *Bank of Buffalo v. Thompson*, *supra*, recognized, in construing a mercantile contract, the commercial conception of partnership, it declared, in setting aside the transfer as contrary to statute: "There is no such potency in the entity known as a copartnership as to shield a stockholder of a corporation from the penalty denounced by this statute because he happens to be a member of a firm, and thus allow him to secure to himself a preference of his claim against a corporation."

### THE PARTNERSHIP NAME

41. Partners may, in the absence of statutory restrictions, carry on their common business in any name they wish. They will be bound on simple contracts made in any name, if in fact such contracts were made on their behalf by one having authority. They cannot, however, be held on negotiable or

<sup>10</sup> *Ex parte Blain*, 12 Ch. D. 522; *Western National Bank of N. Y. v. Perez, Trianca & Co.*, [1891] 1 Q. B. 304; *Ex parte Beauchamp*, [1894] 1 Q. B. 1. See "*Partnership*," *Dec. Dig. (Key No.)* §§ 69, 197; *Cent. Dig.* §§ 93, 360.

<sup>11</sup> *JONES v. BLUN*, 145 N. Y. 333, 39 N. E. 954, *Gilmore, Cas. Partnership*, 150. See "*Corporations*," *Cent. Dig.* § 2155.

sealed instruments, unless signed with an adopted firm name, or with the names of all the partners.

42. If the firm name is also the name of a partner, there is a presumption, if such partner has no separate business of his own, that contracts signed in that name are firm contracts. If he carries on a separate business, no presumption arises. It is a question of fact whether the name represents himself or the partnership.

### *Partnership Name*

At common law, in the absence of statutory limitations, one may carry on business in any name he chooses, if he does not have a wrongful intent in so doing. Likewise persons in the partnership relation may carry on their common business under any name they wish. A firm being at law a collection of individuals, the partnership name is representative of them rather than of the partnership. This being so, an obligation in the names of all of the partners is as much a partnership obligation as though it were signed in a partnership name.<sup>12</sup> It is not necessary that the partners should fix upon a firm name at all.<sup>13</sup> But, if chosen, it is merely a convenient way of expressing the collective names of the partners.<sup>14</sup> It is in law the name or symbol by which each partner has chosen to represent himself, and it may, in the absence of statutory restrictions, consist of the names of any or all of the partners, or the names of individuals who are not partners, or it may be purely fanciful. In some jurisdictions restrictions are

<sup>12</sup> DREYFUS v. UNION NAT. BANK, 164 Ill. 83, 45 N. E. 408; Kahn v. Thomson, 113 Ga. 957, 39 S. E. 322; MCGREGOR v. CLEVELAND, 5 Wend. (N. Y.) 475, Gilmore, Cas. Partnership, 154; BERKSHIRE WOOLEN CO. v. JUILLARD, 75 N. Y. 535, 31 Am. Rep. 488, Gilmore, Cas. Partnership, 156. See "Partnership," Dec. Dig. (Key No.) §§ 64, 136; Cent. Dig. §§ 87-91, 203, 204, 240.

<sup>13</sup> Parsons v. Hayward, 4 De G., F. & J., 474; JURGENS v. ITT-MAN, 47 La. Ann. 367, 16 South. 952. See "Partnership," Dec. Dig. (Key No.) § 64; Cent. Dig. §§ 87-91.

<sup>14</sup> HASKINS v. D'ESTE, 133 Mass. 356, Gilmore, Cas. Partnership, 154. See "Partnership," Dec. Dig. (Key No.) § 64; Cent. Dig. §§ 87-91, 416.

placed upon the name which an individual or firm may use, as forbidding the use by a firm of a name which represents a corporation,<sup>15</sup> or the use of "& Co.," unless it actually represents a member of the firm,<sup>16</sup> and in England it is said to be an offense against the prerogative of the crown for private persons to "assume to act as a corporation."<sup>17</sup>

#### *Authority to Use Firm Name*

If no firm name is chosen, each partner has the implied power to choose and use any appropriate name to represent the firm.<sup>18</sup> If a name is chosen, however, that name becomes the partnership name, and the only one by which the partnership can be bound on those contracts in which the use of a correct name is essential.<sup>19</sup>

#### *Same—Simple Contracts*

It is a principle of agency that in a simple contract he for whom and by whose authority it was made can be bound, whether his name appears in the contract or not, or whether or not his existence was known to the other contracting party.<sup>20</sup> This general rule of agency applies in the case of contracts made by a partner; he being the agent for the firm. His agency extends to the binding of the partnership by contract. If he makes a contract in his own name, but

<sup>15</sup> Cr. Code, Ill. § 220.

<sup>16</sup> See *North v. Moore*, 135 Cal. 621, 67 Pac. 1037; *Brister v. Joseph Bowling Co. (Miss.)* 29 South. 830; *Gulterman v. Wishon*, 21 Mont. 458, 54 Pac. 566; *Castle Bros. v. Graham*, 180 N. Y. 553, 73 N. E. 1120; *Loeb v. Firemen's Ins. Co.*, 78 App. Div. 113, 79 N. Y. Supp. 510; *Lauferty v. Wheeler*, 11 Abb. N. C. (N. Y.) 220; *Walker v. Stimmel*, 15 N. D. 484, 107 N. W. 1081; *Jenner v. Shope*, 67 Misc. Rep. 159, 121 N. Y. Supp. 599; *K. B. Co. v. Batle*, 25 Ohio Cir. Ct. R. 482; *Choctaw Lumber Co. v. Gilmore*, 11 Okl. 462, 68 Pac. 733; *Bovee v. De Jong*, 22 S. D. 163, 116 N. W. 83. See "*Partnership*," *Dec. Dig. (Key No.)* §§ 43, 64; *Cent. Dig.* §§ 60, 87-91.

<sup>17</sup> *Pollock's Digest of the Law of Partnership* (8th Ed.) p. 25.

<sup>18</sup> *Meriden Nat. Bank v. Gallaudet*, 120 N. Y. 298, 24 N. E. 994. See "*Partnership*," *Dec. Dig. (Key No.)* § 64; *Cent. Dig.* §§ 87-91.

<sup>19</sup> *KIRK v. BLURTON*, 9 Mees. & W. 284, *Gilmore, Cas. Partnership*, 381. See "*Partnership*," *Dec. Dig. (Key No.)* § 136; *Cent. Dig.* §§ 203, 204.

<sup>20</sup> *Thomson v. Davenport*, 9 B. & C. 78; *Watteau v. Fenwick* (1893) 1 Q. B. 346; *Levitt v. Hamblet*, [1901] 1 K. B. 53; *Schendel v. Stevenson*, 153 Mass. 351, 26 N. E. 689; *Hubbard v. Ten Brook*, 124

it is shown that it was in fact made for the firm of which he is a member, the firm can be held, even though its existence was unknown to the other party at the time the contract was made,<sup>21</sup> or, if the known members of a firm make a contract for the firm in their own names, a dormant partner can be held thereon.<sup>22</sup> Whether a contract entered into in the name of one partner is his individual obligation, or the obligation of the firm, is a difficult question of fact. It is entirely possible for the partnership to be liable on a contract negotiated in the name of one of its members.

*Same—Negotiable and Sealed Instruments—Authorized*

In the case of negotiable and sealed instruments, the rule of agency is different from that which prevails in the case of simple contracts. Only those whose names appear on such instruments are liable thereon. In order to bind his principal upon an authorized negotiable or sealed instrument, the agent must execute it in his principal's name. Likewise a partner, acting for his firm in an authorized transaction, in order to bind his copartners, must execute the instrument in the adopted firm name.<sup>23</sup> If he uses some other name, his copartners are not liable, unless it should be made to appear that, while the firm has an adopted name, they had also been accustomed to use the other

Pa. 291, 16 Atl. 817, 2 L. R. A. 823, 10 Am. St. Rep. 585; *Kayton v. Barnett*, 116 N. Y. 625, 23 N. E. 24. See "*Contracts*," *Dec. Dig. (Key No.)* §§ 185-188; *Cent. Dig.* §§ 790-810; "*Principal and Agent*," *Dec. Dig. (Key No.)* § 152; *Cent. Dig.* §§ 459, 467-471.

<sup>21</sup> *Ruppell v. Roberts*, 4 Nev. & Man. 31; *ROBINSON v. WILKINSON*, 3 Price, 538; *Bottomley v. Nuttall*, 5 C. B. N. S. 122. See "*Partnership*," *Dec. Dig. (Key No.)* § 136; *Cent. Dig.* §§ 203, 204.

<sup>22</sup> *Beckham v. Drake*, 9 M. & W. 79. See "*Partnership*," *Dec. Dig. (Key No.)* §§ 136, 164; *Cent. Dig.* §§ 203, 204, 296-300.

<sup>23</sup> Negotiable instruments: *KIRK v. BLURTON*, 9 M. & W. 284, *Gilmore, Cas. Partnership*, 381; *Faith v. Richmond*, 11 A. & E. 339; *Williamson v. Johnson*, 1 B. & C. 146; *Macklin's Ex'r v. Crutcher*, 69 Ky. 401, 99 Am. Dec. 680; *Tilford v. Ramsay*, 37 Mo. 563; *Palmer v. Stevens*, 1 Denio (N. Y.) 471. Sealed instruments: *McNaughten v. Partridge*, 11 Ohio, 223, 38 Am. Dec. 731. An immaterial variation in the name used from the real firm will not prevent a recovery upon a bill of exchange so signed. *Norton v. Seymour*, 3 C. B. 792. See "*Partnership*," *Dec. Dig. (Key No.)* § 146; *Cent. Dig.* §§ 242-255.

name.<sup>24</sup> If he uses his own name, he will be personally liable, as he appears as an obligor on the face of the instrument.<sup>25</sup> Can the firm, however, be held on an authorized contract executed in the name of one partner? Admitting that the contract itself was made on behalf of the firm, and was properly authorized, it would seem that the holder of a note or sealed instrument given on such a contract, signed in the name of one of the partners, would be able to bring an action against the partnership, not on the instrument itself, but on the original contract, the terms of which are disclosed by the instrument. Such a holding would in no way injure the partners themselves. They have authorized the contract to be made, and if they have any equitable defenses they may plead them. That such an action could be maintained was clearly implied in *Emly v. Lye*,<sup>26</sup> where the plaintiff failed because unable to prove that the contract was a firm contract, and was in effect decided in the Kentucky cases of *Hikes v. Crawford*,<sup>27</sup> and *Faris v. Cook*.<sup>28</sup> If, however, it has been agreed to take the note or bond of one member as payment of a partnership debt, the debt is thereby extinguished, and the partnership discharged from liability.<sup>29</sup>

<sup>24</sup> *Williamson v. Johnson*, 1 B. & C. 146. See "Partnership," *Dec. Dig.* (Key No.) § 136; *Cent. Dig.* §§ 203, 204.

<sup>25</sup> Sealed instrument: *Appleton v. Binks*, 5 East, 147; *Firemen's Ins. Co. v. Floss*, 67 Md. 403, 10 Atl. 139, 1 Am. St. Rep. 398. Negotiable instrument: *Leadbitter v. Farrow*, 5 Maule & S. 345; *Pentz v. Stanton*, 10 Wend. (N. Y.) 271, 25 Am. Dec. 558. See "Partnership," *Dec. Dig.* (Key No.) § 136; *Cent. Dig.* § 204.

<sup>26</sup> *EMLY v. LYE*, 15 East, 7. See, also, *Wilson v. Kennedy*, 2 Esp. 245; *Puckford v. Maxwell*, 6 T. R. 51. See "Partnership," *Dec. Dig.* (Key No.) §§ 125-164; *Cent. Dig.* §§ 190-300.

<sup>27</sup> 67 Ky. 19. In this case a surety on a note signed by one partner, who was compelled to pay the note, was permitted to recover against the partnership because, as explained in the later cases of *Macklin's Ex'r v. Crutcher*, 69 Ky. 401, 99 Am. Dec. 680, and *Faris v. Cook*, 110 Ky. 867, 62 S. W. 1043, 63 S. W. 600, the creditor might have an action against the firm, not on the note, but on the contract itself. *Fair v. Citizens' State Bank*, 9 Kan. App. 779, 59 Pac. 43; *Hoeflinger v. Wells*, 47 Wis. 628, 3 N. W. 589. See "Partnership," *Dec. Dig.* (Key No.) § 146; *Cent. Dig.* § 248.

<sup>28</sup> 110 Ky. 867, 62 S. W. 1043, 63 S. W. 600. See "Partnership," *Dec. Dig.* (Key No.) § 146; *Cent. Dig.* § 248.

<sup>29</sup> *Bonnell v. Chamberlin*, 28 Conn. 487; *MAFFET v. LEUCKEL*.

*Same—Negotiable and Sealed Instruments—Unauthorized*

If, without authority, a partner signs the firm name to a negotiable or sealed instrument, his copartners are not liable. But, inasmuch as the partnership name is the name of each member, it is usually held that the partner thus executing an instrument in the firm name, without authority, binds himself personally.<sup>30</sup>

It may be, however, that a partner has authority to bind his firm on certain contracts, but not authority to put those contracts in negotiable or sealed form; that is, the contract itself may be authorized, but not the form of it. As pointed out in chapter V, it is only in trading firms that there is an implied power to issue negotiable paper; also, as a general rule, a partner has no implied power to bind his firm by a sealed instrument.<sup>31</sup> When, therefore, he executes and delivers a negotiable or sealed instrument without authority, it is clear that his copartners are not liable upon such instrument, but that he himself may be held thereon.<sup>32</sup> Can the copartners be reached in any way? Applying the principle just noticed in connection with authorized contracts in a partner's name, it would seem that where a partner puts the authorized contract between the firm and the third per-

93 Pa. 468, Gilmore, Cas. Partnership, 317. See "*Partnership*," Dec. Dig. (Key No.) § 146; Cent. Dig. § 248; "*Payment*," Dec. Dig. (Key No.) § 16; Cent. Dig. § 67.

<sup>30</sup> Elliott v. Davis, 2 B. & P. 338; Fulton v. Williams, 11 Cush. (Mass.) 108; Sherman v. Christy, 17 Iowa, 322; Snow v. Howard, 35 Barb. (N. Y.) 55; Morris v. Jones, 4 Har. (Del.) 428; Layton v. Hastings, 2 Har. (Del.) 147; Brozee v. Poyntz, 3 B. Mon. (Ky.) 178; Heath v. Gregory, 46 N. C. 417; Horton v. Child, 15 N. C. 460; Hoskinson v. Elliot, 62 Pa. 393; Palmer v. Taggart, 1 Chest. Co. Rep. (Pa.) 107; Milwee v. Jay, 47 S. C. 430, 25 S. E. 298. Contra: Fisher v. Pender, 52 N. C. 483; Hart v. Withers, 1 Pen. & W. (Pa.) 285. See "*Partnership*," Dec. Dig. (Key No.) §§ 136, 146, 161; Cent. Dig. §§ 203, 204, 242-255, 295½.

<sup>31</sup> See chapter V, § 101, p. 308.

<sup>32</sup> See case, supra, note 30. In Fisher v. Pender, 52 N. C. 483, and Hart v. Withers, 1 Pen. & W. (Pa.) 285, it was held that the partner himself is not liable on the instrument because it was not delivered as his individual deed, but that of the firm. See "*Partnership*," Dec. Dig. (Key No.) §§ 136, 146; Cent. Dig. §§ 203, 204, 242-255.

son, into a negotiable or sealed form, which is unauthorized, the firm should be liable, not on the instrument itself, but upon a simple contract. Thus in *Daniel v. Toney*<sup>33</sup> it was said: "The petition discloses the consideration of the note, and alleges in distinct terms that the lumber and money for which the note was given went to the use and benefit of the firm of which appellant was a member, and was so received and enjoyed by the firm. These allegations are fully upheld by the evidence, and fix his liability as a partner for the value of the property, although the note may not, because of the scrawl, be operative as a partnership obligation." So, also, in *Walsh v. Lennon*,<sup>34</sup> where the plaintiff, who had loaned money to a firm and received a sealed note therefor, which in such form was unauthorized, was permitted to hold the partners on the common counts.

Another way to reach the copartners, where an authorized contract is put in an unauthorized sealed form, is to treat the seal as surplusage, provided it is not essential, and to hold the firm on the instrument as though it were a simple contract.<sup>35</sup> Some courts, however, have refused to permit this, holding that the parties intended to enter into a specialty contract only, and that to treat it as a simple contract would be doing violence to their clear intention.<sup>36</sup>

#### *Partnership Name and Partner's Name the Same*

It not infrequently happens, especially where some of the partners are dormant, that the business of a firm is carried on in the name of one of the partners, which name thereby becomes the firm name. This use of the name of one of the

<sup>33</sup> 59 Ky. 523. See "*Partnership*," *Dec. Dig. (Key No.)* § 146; *Cent. Dig.* § 247.

<sup>34</sup> 98 Ill. 27, 38 Am. Rep. 75. See, further, *Brown v. Bostian*, 51 N. C. 1; *Hoskinson v. Elliot*, 62 Pa. 393. See "*Partnership*," *Dec. Dig. (Key No.)* § 146; *Cent. Dig.* § 247.

<sup>35</sup> *Cook v. Gray*, 133 Mass. 106; *Moore v. Stevens*, 60 Miss. 809. See, also, *Blanchard v. Inhabitants of Blackstone*, 102 Mass. 343. See "*Partnership*," *Dec. Dig. (Key No.)* §§ 136, 137, 146; *Cent. Dig.* §§ 203-205, 240, 247.

<sup>36</sup> *Russell v. Annable*, 109 Mass. 72, 12 Am. Rep. 665; *Schmertz v. Shreeve*, 62 Pa. 457, 1 Am. Rep. 439. See "*Partnership*," *Dec. Dig. (Key No.)* §§ 137, 141, 146; *Cent. Dig.* §§ 205, 218, 240, 247.

partners as the firm name is not likely to produce confusion, except where commercial paper is issued, which gets into the hands of third persons, who are unacquainted with the manner of its origin. Again, it is not likely to arise where the firm is a nontrading partnership, whose members have no implied authority to issue negotiable paper.<sup>87</sup> But if a trading partnership uses the name of one partner as the firm name it may become a question of much difficulty to determine whether negotiable instruments bearing that name have been signed in the partnership or in the individual name. The implied authority exists to sign negotiable paper in the firm name in the firm business; but the partner whose name is used still has the right to sign negotiable paper in his own name in his behalf. In the case of *Yorkshire Banking Co. v. Beatson*,<sup>88</sup> William Beatson and John Mycock carried on business as chemical manufacturers, under the name of William Beatson. Mycock was a dormant partner. Beatson indorsed one bill and accepted another in the name of William Beatson. In a suit against the firm upon the bills, it was held that upon proof that Beatson, the partner whose name was used, carried on no business on his own behalf apart from the partnership business, a presumption arose that the signatures were those of the firm.<sup>89</sup> The presumption is purely one of expediency, the court saying: "The vast majority of bills given under the circumstances supposed would be really partnership bills, and yet it would be often difficult, if not impossible, for the holders of such bills to do more than

<sup>87</sup> See chapter V, § 100, p. 302, on Powers of Partners.

<sup>88</sup> *YORKSHIRE BANKING CO. v. BEATSON*, L. R. 5 C. P. D. 109, Gillmore, Cas. Partnership, 157, 161. See "*Partnership*," Dec. Dig. (Key No.) § 136; Cent. Dig. §§ 203, 204.

<sup>89</sup> *SWAN v. STEELE*, 7 East, 209; *EMLY v. LYE*, 15 East, 7; *Ex parte Bolitho*, 1 Buck, 100; *Bank of South Carolina v. Case*, 8 B. & C. 427; *Furze v. Sharwood*, 2 Q. B. 388; *Nicholson v. Ricketts*, 2 E. & E. 497; *In re Adonsonia Fibre Co. v. Miles' Claim*, L. R. 9 Ch. 635; *United States Bank v. Binney*, 5 Mason, 176, Fed. Cas. No. 16,791; *Bank of Rochester v. Monteath*, 1 Denio (N. Y.) 402, 43 Am. Dec. 681; *Oliphant v. Mathews*, 16 Barb. (N. Y.) 608; *Mifflin v. Smith*, 17 Serg. & R. (Pa.) 165. See "*Partnership*," Dec. Dig. (Key No.) §§ 64, 136, 146; Cent. Dig. §§ 87, 203, 204, 248.

prove that the only trade carried on under the individual name was the trade of partnership, and if they were compelled to go further, and prove that the particular bill was a partnership bill, the effect might be that in many cases dormant partners, and in some cases ostensible ones, too, might escape from just liabilities. On the other hand, the partners sought to be made responsible on the bills would in most instances be able to prove whether any particular bill sued on was or was not a partnership bill, and should, as it appears to us, at least have the onus of doing so thrown upon them, when it is through their own act, in allowing the firm name to be the same as that of an individual in the firm, that difficulty and doubt arise."

This presumption does not arise, even where the firm is a trading partnership, where the partner whose name is used carries on a separate business.<sup>40</sup> It may also be rebutted by proof that the signature was really intended to be that of the persons signing. This was actually proved in the Beatson Case mentioned above.

#### *Use of Name Protected*

It is a matter of some question as to whether or not there is any property in a name as distinguished from its use as a label or trade-mark on certain specific articles.<sup>41</sup> It is clear, however, that one who has or uses a name of established reputation in a business will be protected from the efforts of competitors to secure part of that business through adoption or imitation of the name.<sup>42</sup> And, though it is said that one cannot be prevented from using his own name in business,<sup>43</sup> yet the use of one's own name may be,

<sup>40</sup> *United States Bank v. Binney*, 5 Mason, 176, Fed. Cas. No. 16,791. See "*Partnership*," *Dec. Dig. (Key No.)* §§ 136, 146; *Cent. Dig.* §§ 203, 204, 248, 251.

<sup>41</sup> *Singer Mfg. Co. v. Loog*, L. R. 8 App. Cas. 15; *Borthwick v. Evening Post*, 37 Ch. Div. 449. See "*Partnership*," *Dec. Dig. (Key No.)* § 64; *Cent. Dig.* §§ 87-91; "*Trade-Marks and Trade-Names*," *Dec. Dig. (Key No.)* §§ 23, 31; *Cent. Dig.* §§ 26, 35.

<sup>42</sup> *Blüninger v. Clark*, 60 Barb. (N. Y.) 113. See "*Trade-Marks and Trade-Names*," *Dec. Dig. (Key No.)* §§ 53-101; *Cent. Dig.* §§ 61-115.

<sup>43</sup> *Cash v. Cash*, 19 R. P. C. 181; *Meneely v. Meneely*, 62 N. Y. 427, 20 Am. Rep. 489. See "*Trade-Marks and Trade-Names*," *Dec. Dig. (Key No.)* §§ 10, 59, 64, 73; *Cent. Dig.* §§ 14, 70, 75, 84.

if not enjoined, at least regulated so as to prevent confusion and consequent injury.<sup>44</sup> The protection of a name is not a question peculiar to individuals, for the right of protection of its name against improper aggression belongs to a partnership as well. The security of a firm in the possession of the name it has adopted lies altogether in its right to seek the intervention of equity to prevent fraud. This security does not depend upon any exclusive right which the firm may be supposed to have to a particular name, or to a particular form of words. The right is to be protected against fraud; and fraud may be practiced by means of a name, though the person practicing it may have a perfect right to use that name, provided he does not use it under circumstances such as to effect a fraud upon others.<sup>45</sup>

### PARTNERSHIP PROPERTY

**43. Partnership or firm property means the property which the partners have agreed shall be devoted to the purposes of the partnership relation. What is partnership property, as distinguished from property owned by the partners individually or jointly, depends upon their intention. In the absence of express agreement, the intention is ascertained from the manner and purpose of its acquisition and the way in which it is used. The mere use of property by the firm does not of itself prove that it is partnership property.**

The expression "partnership" or "firm" property means that property, real or personal, which the partners have agreed shall be devoted to partnership purposes. It is clear

<sup>44</sup> Wyckoff, Seaman & Benedict v. Howe Scale Co. of 1886, 122 Fed. 348, 58 C. C. A. 510; Baker v. Baker, 115 Fed. 297, 53 C. C. A. 157. See "*Trade-Marks and Trade-Names*," Dec. Dig. (Key No.) §§ 10, 59, 64, 73; Cent. Dig. §§ 14, 70, 75, 84.

<sup>45</sup> Croft v. Day, 7 Beav. 84; Frazer v. Frazer Lubricator Co., 121 Ill. 147, 13 N. E. 639, 2 Am. St. Rep. 73. See "*Trade-Marks and Trade-Names*," Dec. Dig. (Key No.) §§ 10, 59, 64, 73; Cent. Dig. §§ 14, 70, 75, 84; "*Partnership*," Dec. Dig. (Key No.) § 64; Cent. Dig. §§ 87-91.

that persons engaged in business as partners may have property, owned separately or jointly, which is not firm property. It is for the partners to determine among themselves what shall be the property of them all in their partnership relation, and what shall be the separate property of some one or more of them. It is competent for them, by agreement among themselves, to convert what is the joint property of all into the separate property of some one or more of them, and vice versa. The only true method, therefore, of determining, as between the partners themselves, what belongs to the firm and what does not, is to ascertain what agreement has been come to on the subject. If there is no express agreement, attention must be paid to the source whence the property was obtained, the purpose for which it was acquired, and the mode with which it has been dealt.<sup>46</sup>

*The Manner in Which Acquired*

The property which comes into the hands of the firm by virtue of a claim arising in favor of the firm becomes firm property. Thus the proceeds of a suit for trespass brought for trespass to firm property constitute firm assets.<sup>47</sup> The proceeds are assets of the firm as constituted at the time the cause of action accrued. It was the firm that was injured. Hence, if one partner dies before recovery on a cause of action which accrued in his lifetime, the proceeds recovered become assets of the firm of which he was a member.<sup>48</sup> And any property which is produced by the firm becomes firm property.<sup>49</sup> If the partners improve the property of one of the partners which is used in the partnership, as by building upon his land, such improvements become partnership property.<sup>50</sup>

<sup>46</sup> *Jenkins v. Jenkins*, 81 Ark. 68, 98 S. W. 685. See "*Partnership*," Dec. Dig. (Key No.) §§ 67-69; Cent. Dig. §§ 95-113.

<sup>47</sup> *Collins v. Butler*, 14 Cal. 223. See "*Partnership*," Dec. Dig. (Key No.) §§ 67-69; Cent. Dig. §§ 95-113.

<sup>48</sup> *Richards v. Maynard*, 166 Ill. 466, 46 N. E. 1138. See "*Partnership*," Dec. Dig. (Key No.) § 67; Cent. Dig. § 95.

<sup>49</sup> *Snyder v. Lunsford*, 9 W. Va. 223. See "*Partnership*," Dec. Dig. (Key No.) § 67; Cent. Dig. § 97.

<sup>50</sup> *Clark's Appeal*, 72 Pa. 142. See "*Partnership*," Dec. Dig. (Key No.) § 68; Cent. Dig. § 102.

Property purchased with partnership funds becomes partnership property in the absence of any agreement to the contrary. There is, however, in the absence of fraud, no reason why partners may not purchase property with the partnership assets, and when so purchased each partner may hold his interest therein on his individual account.<sup>81</sup> It may be that it is desired to invest undivided profits in this way rather than by dividing them among the partners, and there is no objection to such a proceeding. In *Collumb v. Read*,<sup>82</sup> the court said: "Where the land was not purchased for partnership uses, and there was no agreement making it partnership property, and yet it was paid for out of the funds of the partnership or taken in payment of debts due it, the question between the two classes of creditors would be one of construction as to the intent of the partners in making the purchase. It might be that such a purchase would be made as an investment of realized profits. If, for instance, the purchase price should be charged to the separate accounts of the partners, that would be an indication that it was considered by them as an application of divided profits. If, on the other hand, the income should be carried into the books of the copartnership, or if the land itself should be included in the periodical inventories of stock in trade, there would be an inference, more or less strong, that it had been agreed to hold the estate as partnership property." But, as stated before, in the absence of evidence to the contrary, property bought with partnership funds becomes partnership property, and when so bought for use in the partnership business the evidence is very strong that the parties so intended.

Where real estate is bought jointly, the tendency of the courts is to construe the manner of its holding as tenancy in common or joint tenancy rather than as held for partnership purposes;<sup>83</sup> and in a case where co-owners of land

<sup>81</sup> *Hoxie v. Carr*, 1 Sumn. 173, Fed. Cas. No. 6,802. See "*Partnership*," *Dec. Dig. (Key No.)* § 67; *Cent. Dig.* § 98.

<sup>82</sup> 24 N. Y. 505, Gilmore, Cas. Partnership, 176, nota. See "*Partnership*," *Dec. Dig. (Key No.)* § 68; *Cent. Dig.* § 108.

<sup>83</sup> *Thompson v. Bowman*, 6 Wall. 316, 18 L. Ed. 736. See "*Partnership*," *Dec. Dig. (Key No.)* § 63; *Cent. Dig.* § 104.

used it as a quarry, and bought other land with the proceeds, it was held that such land did not become partnership land. There was, however, some doubt as to whether there was even a partnership in the business with the proceeds of which the land was bought.<sup>54</sup> The general rule with regard to real estate has been stated by the Supreme Court of Alabama thus: "Steering clear of all cases of fraud, or of the use by one partner, without the approbation of his associates, of partnership funds in the acquisition of real estate, the two facts must concur to constitute real estate partnership property—acquisition with partnership funds, or on partnership credit, and for the uses of the partnership."<sup>55</sup>

*Property Used in the Partnership Business*

The premises upon which a business is principally conducted are often the sole property of a partner. Likewise, in some instances, are the tools of a trade, the furniture of an office, and even what is known as "stock in trade."<sup>56</sup> The mere fact that one of the partners permits his property to be used by the partnership does not necessarily disclose an intent to make it partnership property, nor does it in fact make it such. One partner may supply the entire property used by a partnership, and, if so stipulated, he may remain the owner and possess the legal title; the firm possessing nothing more than a right to use the property in the firm business.<sup>57</sup> Even if property owned by all of

<sup>54</sup> *Steward v. Blakeway*, L. R. 4 Ch. App. 603. See "*Partnership*," *Dec. Dig. (Key No.)* §§ 67-69; *Cent. Dig.* §§ 95-113.

<sup>55</sup> *Brickell, J.*, in *Hatchett v. Blanton*, 72 Ala. 423, 435.

"In the absence of proof of its purchase with partnership funds for partnership purposes, real property standing in the names of several persons is deemed to be held by them as joint tenants or as tenants in common." *Field, J.*, in *Thompson v. Bowman*, 6 Wall. 816, 817, 18 L. Ed. 736. See "*Partnership*," *Dec. Dig. (Key No.)* § 68; *Cent. Dig.* § 104.

<sup>56</sup> *Burdon v. Barkus*, 3 Giff. 412; *Ex parte Owen*, 4 De Gex & S. 351; *Ex parte Smith*, 3 Madd. 63. See "*Partnership*," *Dec. Dig. (Key No.)* §§ 67-69; *Cent. Dig.* §§ 95-113.

<sup>57</sup> *STUMPH et al. v. BAUER et al.*, 76 Ind. 157, *Gilmore, Cas. Partnership*, 175. See "*Partnership*," *Dec. Dig. (Key No.)* § 67; *Cent. Dig.* § 95.

the partners jointly is used in the firm business, such property does not thereby become partnership property.<sup>88</sup> In *Robinson Bank v. Miller et al.*,<sup>89</sup> Newton, Emmons, and Miller entered into an oral agreement of partnership to carry on the business of milling and of buying and selling grain. Each had acquired a one-third interest in a parcel of land upon which the mill, in which the business of the firm was done, was situated. Each paid for his share out of his individual money. Each acquired his interest before the partnership was formed. It was held by the court that the weight of authority supported "the position that where persons who afterwards become partners buy land in their individual names and with their individual funds, before the making of a partnership agreement, the land will be regarded as the individual property of the partners, in the absence of a clear and explicit agreement subsequently entered into by them to make it firm property, or in the absence of controlling circumstances which indicate an intention to convert it into firm assets."

<sup>88</sup> *DAVIS v. DAVIS* [1894] 1 Ch. 393; *Humes v. Higman*, 145 Ala. 215, 40 South. 128; *Ware v. Owens*, 42 Ala. 212, 94 Am. Dec. 672; *Frink v. Branch*, 16 Conn. 260; *ROBINSON BANK v. MILLER*, 153 Ill. 244, 38 N. E. 1078, 27 L. R. A. 449, 46 Am. St. Rep. 883, *Gilmore, Cas. Partnership*, 171; *Theriot v. Michel*, 28 La. Ann. 107; *Gordon v. Gordon*, 49 Mich. 501, 13 N. W. 834; *Reynolds v. Ruckman*, 35 Mich. 80; *Dexter v. Dexter*, 43 App. Div. 268, 60 N. Y. Supp. 371.

"The mere use of the property by the partnership did not impress upon it the character of partnership property. It is not an uncommon occurrence that a partnership uses the property of its several members, or of a preceding partnership. In the absence of an agreement that the property shall become joint property, its title and character is unchanged." *Brickell, C. J.*, in *Hatchett v. Blanton*, 72 Ala. 423. See "*Partnership*," *Dec. Dig. (Key No.)* §§ 67, 68; *Cent. Dig.* §§ 95-111.

<sup>89</sup> *ROBINSON BANK v. MILLER*, 153 Ill. 244, 38 N. E. 1078, 27 L. R. A. 449, 46 Am. St. Rep. 883, *Gilmore, Cas. Partnership*, 171. See "*Partnership*," *Dec. Dig. (Key No.)* § 68; *Cent. Dig.* § 107.

### **SAME—WHAT IS INCLUDED IN PARTNERSHIP PROPERTY**

- 44.** Partnership property, in its largest sense, embraces everything that the firm owns, consisting of both
- (a) The capital contributed by its members, and
  - (b) The property subsequently acquired in partnership transactions.

The term "partnership property" is sometimes used, in a narrower sense, to designate what the firm owns, other than its capital.

During the continuance of a firm, the capital contributed by its members is not distinguishable from other property acquired in partnership transactions. All alike constitutes partnership property or assets, and is treated alike in the administration of the partnership affairs. Third persons are not concerned with the origin of the firm's title. In treating of the general characteristics, therefore, of partnership property, it is impossible to distinguish between the capital and the other property of the partnership. As between themselves, however, under the partnership agreement, the partners have certain rights, and are under certain liabilities, with respect to the partnership capital. It will be convenient first to discuss these rights and liabilities separately, and then to take up the subject of partnership property in general.

### **SAME—PARTNERSHIP CAPITAL**

- 45.** The capital of a partnership is the aggregate of the sums contributed by its members to establish or continue the partnership business.
- 46.** A partner's contribution to the firm's capital need not be in money, but may consist of anything else of value.

The "capital" is, under the agreement of partnership, invariable; and in this respect the force of the expression

differs widely from that of the other expression, "the firm's property or assets"; for the latter fluctuates according to the fortunes of the business. The capital is in some cases (notably, in the cases of professional and mechanical partnerships) a matter of nominal contribution merely, unless we choose to say, rather, that in some cases the capital is in profits, which is a confusing expression. In any case it need not consist of money, but may consist of anything which the parties agree to consider as capital.<sup>60</sup>

#### *Form of Contribution*

It is not necessary, in order to have the contribution to a firm's capital perfectly valid, that such contribution shall be in money in all cases; for, by agreement, the contribution, although stated in terms of money, may be (except in the case of a special partner's contribution) in the form of securities, a patent, the good will of a business, or anything else which is apparently readily convertible into money. It must come into the fund, however, free from liens and incumbrances generally, to the extent of the contribution; and any expenditure upon the property necessary, in order to make the amount agreed to be contributed good, is chargeable to the partner contributing the property.<sup>61</sup>

<sup>60</sup> DEAN v. DEAN, 54 Wis. 23, 11 N. W. 239, Gilmore, Cas. Partnership, 164; Cf. Thomas v. Lines, 83 N. C. 191. See, also, Sexton v. Lamb, 27 Kan. 426; Nutting v. Ashcroft, 101 Mass. 300; Mathers' Ex'r v. Patterson, 33 Pa. 485. Where a former clerk is taken into co-partnership by a firm which was indebted to him, and the amount of such indebtedness is placed to his credit upon the new books, to which, on dissolution of the firm, is added his share of the net profits, such indebtedness will not be regarded as capital put in by such new member, but rather as a loan to the firm, to be repaid him with his share of the profits. Topping v. Paddock, 92 Ill. 92. See, also, Stafford v. Fargo, 35 Ill. 481. A premium paid for admission to another's business is the latter's individual property, and not a contribution to capital. Evans v. Hanson, 42 Ill. 234; Ball v. Farley, 81 Ala. 288, 1 South. 253. See "Partnership," Dec. Dig. (Key No.) § 72; Cent. Dig. §§ 117, 119.

<sup>61</sup> Dunnell v. Henderson, 23 N. J. Eq. 174. See, also, Nichol v. Stewart, 36 Ark. 612; Sexton v. Lamb, 27 Kan. 426. See "Partnership," Dec. Dig. (Key No.) §§ 72, 74; Cent. Dig. §§ 117, 119.

### SAME—AMOUNT OF CONTRIBUTION

47. The amount of capital to be contributed by each partner is to be determined by the agreement between the partners.
48. No partner can increase or diminish his share of the capital without the agreement of the rest.

The amount of each partner's contribution to the firm capital is determined by the agreement of the parties. It may be that the partnership is formed without the contribution of any tangible property to a common fund. It may be that one partner contributes money or its equivalent, and another places his especial skill, experience, or something else personal to himself, at the service of the partnership. In the absence of agreement to the contrary, the capital on dissolution is to be distributed in the proportions paid in by each. In this distribution only the tangible property contributed by each can be considered as capital. Skill, experience, or peculiar ability does not admit of distribution, and on dissolution of the partnership cannot be taken into account. Thus in *Shea v. Donahue*,<sup>52</sup> it was agreed that Shea should contribute \$1,000 to constitute a fund to carry on the business of "making, buying, and selling all kinds of tinware, stones, pumps, etc.," in partnership with Donahue. Donahue, being a practical workman of considerable experience in the business, it was agreed that he should "give the business his entire personal attention and the benefit of his experience" to place against the cash furnished by Shea. On dissolution it was contended by Donahue that he was entitled to share equally in the capital as in the profits, "and this, although it goes without saying he would retain all his practical experience which was to be placed against the cash furnished by his partner." It was held, however, that there was "nothing

<sup>52</sup> *SHEA v. DONAHUE*, 83 Tenn. 160, 54 Am. Rep. 407, Gilmore, Cas. Partnership, 168. See "*Partnership*," *Dec. Dig. (Key No.)* § 304; *Cent. Dig.* § 702.

in the agreement to take the case out of the ordinary one of a partnership in profit and loss upon unequal capitals"; that in consequence Shea was entitled to be paid \$1,000 as his contribution to the firm capital before the profits were divided.

Having agreed to contribute a certain amount to the firm capital, a partner can be compelled to pay that amount. He cannot, however, be required to pay more than the agreed amount, even though the necessity may be extreme, and though the alternative may be a dissolution of the partnership. The capital of a firm remains stationary, except as the members as a whole agree, and no partner can, of himself, either increase or diminish his proportion.<sup>63</sup> If undivided profits are permitted to remain in the firm, they do not thereby become capital; <sup>64</sup> nor do they become a loan for which the partner who is entitled to them can charge interest, in the absence of an agreement to that effect.<sup>65</sup>

On the dissolution of a partnership, each member is entitled to draw out the proportion of capital which he contributed. But even though the proportions were unequal, it will be presumed, in the absence of agreement to the contrary, that profits and losses are to be shared equally. In determining losses, the capital of each member is considered as a debt due from the firm, and each member will be required to contribute equally in order to make up the deficiency which the assets of the firm are unable to meet.

<sup>63</sup> *Farmer v. Samuel*, 4 Litt. (Ky.) 187, 14 Am. Dec. 106; *Fulmer's Appeal*, 90 Pa. 143; *Cock v. Evans' Heirs*, 9 Yerg. (Tenn.) 287. See "*Partnership*," *Dec. Dig. (Key No.)* §§ 68, 76; *Cent. Dig.* §§ 101-111, 116, 124.

<sup>64</sup> *DEAN v. DEAN*, 54 Wis. 23, 11 N. W. 239, *Gilmore, Cas. Partnership*, 164. See "*Partnership*," *Dec. Dig. (Key No.)* §§ 72, 305; *Cent. Dig.* §§ 117, 703-705.

<sup>65</sup> *Dexter v. Arnold*, Fed. Cas. No. 3,855; *Gage v. Parmelee*, 87 Ill. 329; *Bowling's Heirs v. Dobyns' Adm'rs*, 5 Dana (Ky.) 434; *Sweeney v. Neely*, 53 Mich. 421, 19 N. W. 127; *Buckingham v. Ludlum*, 29 N. J. Eq. 345; *Rensselaer Glass Factory v. Reid*, 5 Cow. (N. Y.) 587; *Brown's Appeal*, 89 Pa. 139; *Gilman v. Vaughan*, 44 Wis. 646. See "*Partnership*," *Dec. Dig. (Key No.)* § 75; *Cent. Dig.* §§ 120-123.

In *Whitcomb v. Converse et al.*,\*\* *Whitcomb, Converse, Stanton, and Blagden* entered into a partnership; *Whitcomb* and *Converse* contributing the entire capital. The partnership was dissolved by mutual consent, and *Whitcomb* wound up the business. The business resulted in a loss, and *Whitcomb* brought a bill in equity to compel contribution from the other partners to make up his loss of capital. *Blagden* being insolvent, it was held that the capital contributed by each partner constituted a debt of the partnership, and each solvent partner must share equally in its loss.\*\*

### SAME—GOOD WILL

49. The "good-will" of a business represents the momentum of organization possessed by a "going concern," with the advantages of an established location, name, and reputation. It is part of the assets of a partnership business, and may be sold and transferred. Its value must be accounted for by the surviving partner to the representatives of the deceased partner.
50. The vendee of the good will of a partnership business acquires the sole right to represent himself as continuing such business, and to carry it on in the old firm name, provided, however, that he will not thereby subject the vendor to liability.
51. Unless restricted by an express agreement, the vendor of a business and its good will may enter into the same line of business again in the same locality; but he may not represent himself as continuing the old business, and according to some decisions he

\*\* *WHITCOMB v. CONVERSE*, 119 Mass. 38, 20 Am. Rep. 311, Gilmore, Cas. Partnership, 488. See "*Partnership*," *Dec. Dig. (Key No.)* §§ 303-305; *Cent. Dig.* §§ 700-705.

\*\* *Barfield v. Loughborough*, L. R. 8 Ch. 1; In re *Anglesea Colliery Co.*, L. R. 2 Eq. 379; *Nowell v. Nowell*, L. R. 7 Eq. 538; In re *Hodges' Distillery Co.*, L. R. 6 Ch. 51; *BRADBURY v. SMITH*, 21 Me. 117; *Jullo v. Ingalls*, 1 Allen (Mass.) 41. See "*Partnership*," *Dec. Dig. (Key No.)* §§ 303-305; *Cent. Dig.* §§ 700-705.

may not personally solicit the customers of the old business. He may use his own name, provided such use will not amount to a representation that he is continuing the old business.

*Good Will—Former Attitude of Courts*

The term "good will" has not yet received a precise significance in the law. This is due in part to the fact that the good will of a business has not long been recognized as an asset of the business. Though Lord Hardwicke,<sup>68</sup> in 1743, in reference to the duties of an executor, said: "Suppose the house were a house of great trade, he must account for the value of what is called the good will of it," it was held in 1800 by Lord Loughborough, in *Hammond v. Douglas*,<sup>69</sup> that the good will of a business was not a part of the partnership stock, which must be accounted for by a surviving partner to the representatives of the deceased. Though doubt was expressed later by Lord Eldon,<sup>70</sup> the decision of *Hammond v. Douglas* was sustained in 1835 by Vice Chancellor Shadwell in *Lewis v. Langdon*.<sup>71</sup> Early text writers on Partnership paid little attention to good will. Watson,<sup>72</sup> writing in the latter part of the eighteenth century, does not refer to it, and Kent, writing a little more than a quarter of a century later, in a passing reference, declared that "the good will of a trade is not partnership stock."<sup>73</sup>

*Same—Good Will Defined*

The small importance formerly attached to good will was due in part to the comparatively narrow definition

<sup>68</sup> *Gibblett v. Read*, 9 Mod. 459. See "*Partnership*," Dec. Dig. (Key No.) §§ 229, 257, 300, 310; Cent. Dig. §§ 477, 563, 694; "*Good Will*," Dec. Dig. (Key No.) §§ 1-7; Cent. Dig. §§ 1-9.

<sup>69</sup> 5 Ves. 539. See "*Partnership*," Dec. Dig. (Key No.) §§ 229, 257, 300, 310; Cent. Dig. §§ 477, 563, 694, 712.

<sup>70</sup> *Crawshay v. Collins*, 15 Ves. 227. See "*Partnership*," Dec. Dig. (Key No.) §§ 229, 257, 300, 310; Cent. Dig. §§ 477, 563, 694, 712.

<sup>71</sup> 7 Sim. 421. See "*Partnership*," Dec. Dig. (Key No.) §§ 229, 257, 300, 310; Cent. Dig. §§ 477, 563, 694, 712.

<sup>72</sup> Watson on Partnership (1st Ed.) 1794.

<sup>73</sup> Kent's Com. \*64.

which was given to the term. Lord Eldon,<sup>74</sup> in 1810, said: "The good will which has been the subject of sale is nothing more than the probability that the old customers will resort to the old place."<sup>75</sup> In 1828 Sir John Leach, M. R., said: "The good will of the business is nothing more than an advantage attached to the possession of the house." While according to Lord Langdale, in *England v. Downs*,<sup>76</sup> decided in 1842: "Good will is the chance or probability that custom will be at a certain place, in consequence of the way in which that business has been previously carried on." But whatever good will is to-day, there is no doubt that it comprises far more than the mere benefit to be derived from carrying on a business in a particular place. Modern methods of advertising and solicitation have come to make it mean at least something besides that. Vice Chancellor Wood, in *Churton v. Douglas*,<sup>77</sup> pointed out that, while location is important, it would be absurd to say that in case of a large wholesale business it made any great difference to the public whether it was located at one end of the Strand or the other, or in the Strand, or any place adjoining. The location at which the business is carried on is not the chief element of value in its good will. "When you are parting with the good will of a business you mean to part with all that disposition which customers entertain towards the house of business identified by the particular name or firm, and which may induce them to continue giving their custom to it." The wider significance thus given to the term "good will" is also shown in the words of a New York case:<sup>78</sup> "Good will embraces at least two elements: The advantage of continuing an estab-

<sup>74</sup> *Cruttwell v. Lye*, 17 Ves. 335, 346. See "Good Will," *Dec. Dig. (Key No.)* § 1; *Cent. Dig.* § 1.

<sup>75</sup> *Chisum v. Dewes*, 5 Russ. 29, 30. See "Good Will," *Dec. Dig. (Key No.)* § 1; *Cent. Dig.* § 1.

<sup>76</sup> 6 Beav. 269. See "Good Will," *Dec. Dig. (Key No.)* § 1; *Cent. Dig.* § 1.

<sup>77</sup> *H. R. V. Johns*, 174. See "Good Will," *Dec. Dig. (Key No.)* § 1; *Cent. Dig.* § 1.

<sup>78</sup> *People ex rel. A. J. Johnson Co. v. Roberts*, 159 N. Y. 70, 53 N. E. 635, 45 L. R. A. 126. See "Good Will," *Dec. Dig. (Key No.)* § 1; *Cent. Dig.* § 1; "Taxation," *Dec. Dig. (Key No.)* § 397.

lished business in its old place, and of continuing it under the old style or name. While it is not necessarily altogether local, it is usually to a great extent, and must of necessity be, an incident to a place, an established business, or name known to the trade."

Notwithstanding the increasing importance of good will in the business world, its limits are not yet clearly defined, perhaps because they have not yet been reached. Though the bill drawn by Sir F. Pollock, which served as a foundation for the English Partnership Act,<sup>79</sup> dealt with the subject of good will, the act itself does not. In the introduction to the seventh edition of Lindley's Law of Partnership it is said:<sup>80</sup> "Owing, it is believed, to differences of opinion, and to the difficulty of arriving at a conclusion which would be acceptable to both Houses of Parliament, the clauses relating to these subjects were struck out. The law upon them must therefore be extracted from judicial decisions, and the doubts and difficulties which beset questions arising on these subjects must remain for future judicial or legislative solution." In a few states good will has received legislative definition. For instance, the Civil Code of California defines it as follows:<sup>81</sup> "The good will of a business is the expectation of continued public patronage, but it does not include a right to use the name of any person from whom it was acquired. The good will of a business is property, transferable like any other." It is noticeable that the name of the vendor of a business does not go with the good will according to this definition, though it may be that the name of a proprietor of a business may become so closely associated with a business that the good will minus the name is of little practical value.

In *Churton v. Douglas*,<sup>82</sup> Vice Chancellor Wood said: "The word 'firm,' I believe, like most mercantile terms, is derived from an Italian word, which means simply signa-

<sup>79</sup> Partnership Act, 1890.

<sup>80</sup> Lindley's Law of Partnership (7th Ed.) p. 8.

<sup>81</sup> Sections 992, 993.

<sup>82</sup> H. R. V. Johns. 174, 189. See "Good Will," *Dec. Dig. (Key No.)* § 1; *Cent. Dig.* § 1; "Partnership," *Dec. Dig. (Key No.)* §§ 229, 257, 300, 310; *Cent. Dig.* §§ 477, 563, 694, 712.

ture; and it is as much the name of the house of business as John Nokes or Thomas Stiles is the name of an individual. The name of a firm is a very important part of the good will of the business carried on by the firm." In the same case the Vice Chancellor gave what is the most widely quoted judicial definition of good will: "'Good will,' I apprehend, must mean every advantage—every positive advantage, if I may so express it—as contrasted with the negative advantage of the late partner not carrying on its business himself that has been acquired by the old firm in carrying on its business, whether connected with the premises in which the business was previously carried on, or with the name of the late firm, or with any other matter carrying with it the benefit of the business." Good will represents the momentum of organization. It represents the expenditure of time, capital, and energy involved in overcoming the inertia of a business which has not yet been "launched," and transforming it into a "going concern." It represents, also, the favor which an established business has acquired in the eyes of the purchasing public, in so far as such favor can be transferred with the business which produced it.

*Same—Must be Accounted for by a Surviving Partner*

The good will of a business is inseparable from the business itself. In order to have a good will there must be a business to which it is attached. Hence, if a partner dies, and the firm business is wound up, the surviving partners may immediately begin a new business in the same line and in the same locality. The surviving partner has the authority to wind up the firm business, and he is liable to the deceased partner's representatives for such partner's share of the surplus remaining after debts are paid; but he cannot continue the business and subject them to future liabilities. These considerations led Vice Chancellor Shadwell,<sup>23</sup> following *Hammond v. Douglas*,<sup>24</sup> to say: "If a

<sup>23</sup> *Lewis v. Langdon*, 7 Sim. 421. See "*Partnership*," Dec. Dig. (Key No.) §§ 229, 257, 300, 310; Cent. Dig. §§ 477, 563, 694, 712.

<sup>24</sup> 15 Ves. 227. See "*Partnership*," Dec. Dig. (Key No.) §§ 229, 257, 300, 310; Cent. Dig. §§ 477, 563, 694, 712.

partnership is carried on between A. and B. under the name of Smith & Co., and the surviving partner chose to discontinue the business, and to write to the customers and say that his partner was dead, and that the business was at an end, the effect would be that that which is said to be salable would cease to exist. Now what power is there in a court of equity to compel a partner to carry on a trade after the death of his copartner merely that, at a future time, the good will, as it is called, may be sold? It is plain that, unless there is such a power in this court, it must be in the discretion of the surviving partner to determine what shall be done with the good will; and, if that is the case, it must be his property."

The former rule, that the good will of a business goes to the surviving partners, and need not be accounted for to the representatives of the deceased, no longer prevails in England or in the United States.<sup>85</sup> The good will of a firm is built up by the combined industry and credit of the partners, and if it can be disposed of—that is, if the firm business can be sold as that of a going concern—the representatives of the deceased are entitled to have an accounting of the value of the good will.<sup>86</sup> It frequently happens that the survivors continue the business, and that they buy the share of the deceased partner. In such a case they succeed to the benefits arising from the favor which the business has obtained, and may be compelled to account for those benefits.<sup>87</sup>

<sup>85</sup> Slater v. Slater, 175 N. Y. 143, 67 N. E. 224, 61 L. R. A. 796, 96 Am. St. Rep. 605; Rammelsberg v. Mitchell, 29 Ohio St. 22; Holden's Adm'rs v. McMakin, 1 Pars. Eq. Cas. (Pa.) 270; Tennant v. Dunlop, 97 Va. 234, 33 S. E. 620; Rowell v. Rowell, 122 Wis. 1, 99 N. W. 473; In re David (1899) 1 Ch. 378; Hall v. Barrows, 4 De G. J. & S. 150; Smith v. Everett, 27 Beav. 446; Wedderburn v. Wedderburn, 22 Beav. 84. See "Partnership," Dec. Dig. (Key No.) §§ 229, 257, 300, 310; Cent. Dig. §§ 477, 563, 694, 712.

<sup>86</sup> Matter of Silkman, 121 App. Div. 202, 105 N. Y. Supp. 872, affirmed in 190 N. Y. 560, 83 N. E. 1131. See "Partnership," Dec. Dig. (Key No.) §§ 229, 257, 300, 310; Cent. Dig. §§ 477, 563, 694, 712.

<sup>87</sup> Slater v. Slater, 175 N. Y. 143, 67 N. E. 224, 61 L. R. A. 796, 96 Am. St. Rep. 605; Rowell v. Rowell, 122 Wis. 1, 99 N. W. 473; Wedderburn v. Wedderburn, 22 Beav. 84. See "Partnership," Dec. Dig. (Key No.) §§ 229, 257, 300, 310; Cent. Dig. §§ 477, 563, 694, 712.

*Same—Rights of the Vendee*

The purchaser of a business gets with it, as incident thereto, in the absence of stipulation to the contrary, the good will of the business.<sup>88</sup> He thereby gets the right to advertise to the public generally that he is the successor to the business of his vendor, and that he is carrying on that business.<sup>89</sup>

*Same—Right to Use Old Firm Name*

It seems doubtful, however, as to the extent the purchase of the good will of a business entitles one to use the old name. Though it has been repeatedly said that the firm name constitutes an important part of the good will of the firm,<sup>90</sup> yet there is danger of liability accruing to one who permits himself to be held out as a member of a firm or as proprietor of a business in which he is not in fact interested. Hence, where a business name is the name of an individual, or it is partly composed of such a name, the courts, if they permit the purchaser of the good will to use the old firm name, will compel him to do so so as to avoid possible injury to the vendor. In *Levy v. Walker*,<sup>91</sup> Misses Charbonnel and Walker were conducting a business under the name of Charbonnel & Walker. Miss Charbonnel having married Levy, the partnership was dissolved. Miss Walker purchased the business and good

<sup>88</sup> *Jennings v. Jennings*, 1 Ch. 378; *Menendez v. Holt*, 128 U. S. 514, 9 Sup. Ct. 143, 32 L. Ed. 528; *Hoxie v. Chaney*, 143 Mass. 592, 10 N. E. 713, 58 Am. Rep. 149; *Merry v. Hoopes*, 111 N. Y. 415, 18 N. E. 714; *Steinfeld v. National Shirt Waist Co.*, 99 App. Div. 286, 90 N. Y. Supp. 964. See "Good Will," *Dec. Dig. (Key No.)* §§ 1-6; *Cent. Dig.* §§ 1-5.

<sup>89</sup> *Churton v. Douglas*, H. R. V. Johns. 174; *Holbrook v. Nesbitt*, 163 Mass. 120, 39 N. E. 794; *Fite v. Dorman* (Tenn.) 57 S. W. 129. See "Partnership," *Dec. Dig. (Key No.)* §§ 229, 257, 300, 310; *Cent. Dig.* §§ 477, 563, 694, 712.

<sup>90</sup> *Churton v. Douglas*, H. R. V. Johns. 174; *People ex rel. A. J. Johnson Co. v. Roberts*, 159 N. Y. 70, 53 N. E. 685, 45 L. R. A. 126. See "Partnership," *Dec. Dig. (Key No.)* §§ 228, 229, 256, 257; *Cent. Dig.* §§ 476, 477, 562, 563.

<sup>91</sup> 10 Ch. Div. 438. See "Partnership," *Dec. Dig. (Key No.)* §§ 228, 229, 256, 257; *Cent. Dig.* §§ 476, 477, 562, 563; "Good Will," *Dec. Dig. (Key No.)* §§ 1-6; *Cent. Dig.* §§ 1-5.

will, and continued the business under the same name. Mr. and Mrs. Levy, having commenced a business in Paris under the name of Charbonnel et Cie., sought to enjoin the use of the name Charbonnel by Miss Walker. Jessel, M. R., said: "The plaintiffs are under no liability by reason of Miss Walker so carrying on the business. The plaintiffs are not actual partners in the firm of Charbonnel & Walker. The dissolution decreed by the court has been duly advertised, and no person dealing with Miss Walker for the first time can make Mr. or Mrs. Levy liable. \* \* \* What conceivable interest the plaintiffs may have in the question as to the firm name under which Miss Walker chooses to carry on the business I have been unable to ascertain." From the foregoing it is evident that the only way that a vendee of a business can raise an objection to the use of the old firm name by the purchaser is by showing a possible injury to himself from the use of such name. If he can, the use of the name by the purchaser will be enjoined, unless the vendor expressly agreed that he might use it. In *Thynne v. Shove*,<sup>22</sup> Thynne sold his business to Shove, including good will and certain trade cards bearing the name "O. Thynne, Baker." Shove used the cards till exhausted, and then printed others in the same name. Thynne sought to enjoin the printing and use of such cards, alleging that "the defendant has no right to use my name, and I strongly object to his so doing, as it will materially injure me if I start in business again at Blackheath." Sterling, J., observed that such a demand was far in excess of the plaintiff's rights; that the only limitation on the defendant's right to use the name of the plaintiff was in using it in such a way as to expose the plaintiff to any liability by being held out as the real owner of the business. The defendant was enjoined from using the name of the plaintiff so as to expose him to liability. New York has held that a firm name in the form of "J. & J. Slater" was part of the good will, and the right to use

<sup>22</sup> L. R. 45 Ch. D. 577. See "*Partnership*," *Dec. Dig. (Key No.)* §§ 228, 229, 256, 257; *Cent. Dig.* §§ 476, 477, 562, 563; "*Good Will*," *Dec. Dig. (Key No.)* §§ 1-6; *Cent. Dig.* §§ 1-5.

the name could be sold to the survivor or a stranger.<sup>83</sup> In this case a statute<sup>84</sup> required the purchaser to make the facts relating to the continued use of the firm name a matter of public record. Hence every one was given notice as to who the proprietor was, and no legal liability could attach to those whose names constituted a part of such partnership name. In Louisiana it has been decided, however, that the trade-name of a business does not pass with the good will, and that the use of such name might be enjoined without reference to the injury caused by the use of such name.<sup>85</sup>

*Same—Rights of the Vendor*

The vendor of the good will of a business "may do everything that a stranger to the business in ordinary course would be in a position to do. He may set up where he will. He may push his wares as much as he pleases. He may thus interfere with the custom of his neighbor as a stranger and an outsider might do; but he must not, I think, avail himself of his special knowledge of the old customers to regain without consideration that which he has parted with for value. He must not make his approaches from the vantage ground of his former position, moving under cover of a connection which is no longer his. He may not sell the custom and steal away the customers in that fashion. That, at all events, is opposed to the com-

<sup>83</sup> Slater v. Slater, 175 N. Y. 143, 67 N. E. 224, 61 L. R. A. 796, 96 Am. St. Rep. 605. The following cases also recognize the right of the purchaser of the good will to use the old firm name: Snyder Mfg. Co. v. Snyder, 54 Ohio St. 86, 43 N. E. 325, 31 L. R. A. 657; Rowell v. Rowell, 122 Wis. 1, 99 N. W. 473. In WILLIAMS v. FARRAND, 88 Mich. 473, 50 N. W. 446, 14 L. R. A. 161, Gilmore, Cas. Partnership, 177, the court stated that the purchaser will not, in the absence of an express agreement, be allowed to continue the business in the name of the old firm. See "Partnership," Dec. Dig. (Key No.) §§ 228-230, 256, 257; Cent. Dig. §§ 476-477½, 562, 563; "Good Will," Dec. Dig. (Key No.) §§ 1-6; Cent. Dig. §§ 1-5.

<sup>84</sup> Sections 20 and 21 of New York Partnership Law (chapter 420, Laws 1897).

<sup>85</sup> Vonderbank v. Schmidt, 44 La. Ann. 264, 10 South. 616, 15 L. R. A. 462, 32 Am. St. Rep. 336. See "Partnership," Dec. Dig. (Key No.) §§ 228, 229, 256, 257; Cent. Dig. §§ 476, 477, 562, 563; "Good Will," Dec. Dig. (Key No.) §§ 1-6; Cent. Dig. §§ 1-5.

mon understanding of mankind and the rudiments of commercial morality, and is not, I think, to be excused by any maxim of public policy." \*\* The remarks quoted were made in a case where the question involved was as to the right of a member of an old firm, who has disposed of his interest in the good will, to solicit custom from the former customers of the firm. The question has been a cause of division among the authorities. It is admitted that a vendor of the good will of a business can set up in a similar business in the same locality and solicit customers generally.† The courts have hesitated to draw a line between solicitation in general and personal solicitation of the old customers. In a well-considered case, the Michigan court held,‡ in accordance with the then established rule in England, that "the doctrine that a retiring partner who conveyed his interest in an established business, whether the good will be included or not, cannot personally solicit the customers of the old firm, has no support in principle." The case of *Pearson v. Pearson*,§ upon which the court here relied, was, however, overruled in England by the House of Lords in *Trego v. Hunt*, and the rule of the

\*\* Lord Macnaghten in *TREGO v. HUNT*, L. R. [1896] App. Cas. 1, 24; *WILLIAMS v. FARRAND*, 88 Mich. 473, 50 N. W. 446, 14 L. R. A. 161, Gilmore, Cas. Partnership, 177; *Hutchinson v. Nay*, 183 Mass. 355, 67 N. E. 601. See "Partnership," Dec. Dig. (Key No.) §§ 228-230, 256, 257; Cent. Dig. §§ 476-477½, 562, 563; "Good Will," Dec. Dig. (Key No.) § 6; Cent. Dig. § 5.

† *White v. Trowbridge*, 216 Pa. 11, 64 Atl. 862. See "Partnership," Dec. Dig. (Key No.) §§ 228-230, 256, 257; Cent. Dig. §§ 476-477½, 562, 563; "Good Will," Dec. Dig. (Key No.) §§ 1-6; Cent. Dig. §§ 1-5.

‡ *WILLIAMS v. FARRAND*, 88 Mich. 473, 50 N. W. 446, 14 L. R. A. 161, Gilmore, Cas. Partnership, 177. See, also, *Webster v. Webster*, 180 Mass. 310, 62 N. E. 383, and *Hutchinson v. Nay*, 187 Mass. 262, 72 N. E. 974, 68 L. R. A. 186, 105 Am. St. Rep. 390, where the question of the right to solicit old customers is left open. See "Partnership," Dec. Dig. (Key No.) §§ 228-230, 256, 257; Cent. Dig. §§ 476-477½, 562, 563; "Good Will," Dec. Dig. (Key No.) §§ 1-6; Cent. Dig. §§ 1-5.

§ 27 Ch. Div. 145. See "Partnership," Dec. Dig. (Key No.) §§ 228-230, 256, 257; Cent. Dig. §§ 476-477½, 562, 563; "Good Will," Dec. Dig. (Key No.) §§ 1-6; Cent. Dig. §§ 1-5.

earlier case of *Labouchere v. Dawson*<sup>1</sup> re-established there. As the law stands, there is very strong authority for the position that the vendor may not solicit the customers of the old business.<sup>2</sup> With regard to the use of the old firm name, the vendor of the good will is bound by the same restrictions as strangers to the business. He may not use it to enable him to lead the public to believe that he is continuing the old business.<sup>3</sup>

### TITLE TO PARTNERSHIP PROPERTY— HOW TAKEN AND HELD

52. Title to personal property can be taken and held in the partnership name. Because of the lack of certainty as to the grantee, caused by the use of such a name, it is generally held that title to real estate cannot be taken in a partnership name. The legal title to land conveyed to a partnership in the partnership name vests only in those whose names appear in the partnership name. If the name of no person appears in such name, the conveyance is a nullity. There is some authority, however, for the position that, if the persons meant by the partnership name can be identified, the legal title will vest in them.

#### *Title to Partnership Property—How Taken and Held—Personal Property*

In refusing to recognize the legal existence of the firm as an entity, the law has made it impossible for the firm,

<sup>1</sup> L. R. 13 Eq. 322. See "*Partnership*," Dec. Dig. (Key No.) §§ 228-230, 256, 257; Cent. Dig. §§ 476-477½, 562, 563; "*Good Will*," Dec. Dig. (Key No.) §§ 1-6; Cent. Dig. §§ 1-5.

<sup>2</sup> *TREGO v. HUNT*, L. R. [1896] App. Cas. 1. See "*Partnership*," Dec. Dig. (Key No.) §§ 228-230, 256, 257; Cent. Dig. §§ 476-477½, 562, 563; "*Good Will*," Dec. Dig. (Key No.) §§ 1-6; Cent. Dig. §§ 1-5.

<sup>3</sup> *Churton v. Douglas*, H. R. V. Johns. 174; *WILLIAMS v. FAR-RAND*, 88 Mich. 473, 50 N. W. 446, 14 L. R. A. 161, *Gillmore, Cas. Partnership*, 177; *Myers v. Kalamazoo Buggy Co.*, 54 Mich. 215,

as such, to hold the legal title to any kind of property whatsoever. The ordinary business transactions of the firm are, however, conducted in the partnership name, and the law recognizes that name as sufficiently representative of the partners to enable them to bind themselves by it. Bills of sale of personal property in the partnership name pass title to the property described. A chattel mortgage in a firm name does the same. In *Hendren et al. v. Wing et al.*,<sup>4</sup> though the same court had held that "a partnership as such cannot be the grantee in a deed or hold real estate," and that "if the deed be to a name adopted as the firm style, which includes the name of no party, it passes nothing at law,"<sup>5</sup> it was decided a chattel mortgage did pass title. In this case a chattel mortgage was made to the Arkansas Machinery & Supply Company, a partnership, in the firm name. The court said: "The business of the country is largely carried on by partners under partnership names, which frequently do not contain the name of any person. Vast quantities of personal property of all kinds are contracted for, bought, and sold by such firms under their firm names each year, and their right to thus buy and sell goes unchallenged. A consideration of this fact shows that there is a wide distinction between the rights of partnerships at law in regard to the buying and selling of personal property and the restrictions which prevail therein in regard to transfers of real estate. A mortgage is only a conveyance for the purpose of securing a debt. If a bill of sale conveying personal property to a partnership by its firm name is valid, we see no reason why a mortgage of personal property to a partnership should not be upheld under like circumstances." The fact that the mortgage is under seal does not alter the rule.<sup>6</sup>

19 N. W. 961, 20 N. W. 545, 52 Am. Rep. 811. See "*Partnership*," *Dec. Dig.* (Key No.) §§ 228-230, 256, 257; *Cent. Dig.* §§ 476-477½, 562, 563; "*Good Will*," *Dec. Dig.* (Key No.) §§ 1-6; *Cent. Dig.* §§ 1-5.

<sup>4</sup> *HENDREN v. WING*, 60 Ark. 561, 31 S. W. 149, 46 Am. St. Rep. 218, Gilmore, Cas. Partnership, 189. See "*Partnership*," *Dec. Dig.* (Key No.) § 64; *Cent. Dig.* § 90.

<sup>5</sup> *Percifull v. Platt*, 36 Ark. 456. See "*Partnership*," *Dec. Dig.* (Key No.) § 68; *Cent. Dig.* § 105.

<sup>6</sup> In *MAUGHAN v. SHARPE*, 17 C. B. N. S. 443, a chattel mort-

*Same—Real Property*

In the case of real estate, it has repeatedly been declared that the title thereto cannot be held by a partnership.<sup>7</sup> This is, of course, true when we consider the nature of a partnership. Its nature does not permit of its holding property. Since the partnership cannot hold property, it has been decided in many courts that, if a conveyance of real estate is made to a partnership in the partnership name, the legal title vests in those partners whose names appear in the partnership name—they being the only grantees mentioned in the conveyance who are capable of receiving and holding title to the real estate conveyed; the remaining partners, even if designated by the collective term "and Co.," getting no legal title whatever.<sup>8</sup> The grounds upon which the above cases were decided are summed up in the case of *Percifull v. Platt*, as follows:<sup>9</sup>

gage under seal was given to the firm known as the City Investment & Advance Company. Williams, J., said: "The deed purports and intends to convey the goods to those persons who use the style and firm of the City Investment & Advance Company. They may or may not be a corporation, but when it is ascertained that those who carry on business under that name are the defendants, the deed operates to convey the property to them." See "*Partnership*," *Dec. Dig. (Key No.)* § 68; *Cent. Dig.* § 90.

<sup>7</sup> *GILLE v. HUNT*, 35 Minn. 357, 29 N. W. 2, Gilmore, Cas. Partnership, 190; *Percifull v. Platt*, 36 Ark. 456; *Moreau v. Saffarans*, 3 Sneed (Tenn.) 599, 67 Am. Dec. 582; *HOLMES v. JARRETT*, 7 Helsk. (Tenn.) 506; *Tidd v. Rines*, 26 Minn. 201, 2 N. W. 497; *WOODWARD v. McADAM*, 101 Cal. 438, 35 Pac. 1016. See "*Partnership*," *Dec. Dig. (Key No.)* § 68; *Cent. Dig.* §§ 101-111.

<sup>8</sup> *Riddle v. Whitehill*, 135 U. S. 621, 10 Sup. Ct. 924, 34 L. Ed. 282; *Percifull v. Platt*, 36 Ark. 456; *GILLE v. HUNT*, 35 Minn. 357, 29 N. W. 2, Gilmore, Cas. Partnership, 190; *Arthur v. Weston*, 22 Mo. 378.

In *Kringle v. Rhomberg*, 120 Iowa, 472, 94 N. W. 1115, it was held that, "where title to real estate purchased in a partnership transaction is taken in the name of one of the partners, there is a resulting trust in favor of the partnership, which may be established by parol evidence, so that the title in the one partner may be charged with the interest of the partnership." See further, chapter II, §§ 27, 28, p. 93. See "*Partnership*," *Dec. Dig. (Key No.)* § 68; *Cent. Dig.* §§ 101-111; "*Deeds*," *Cent. Dig.* § 288.

<sup>9</sup> *Percifull v. Platt*, 36 Ark. 456. See "*Partnership*," *Dec. Dig. (Key No.)* § 68; *Cent. Dig.* § 105.

"A partnership, as such, cannot, at law, be the grantee in a deed, or hold real estate. The legal title must vest in some person, and a partnership is not a corporation. If the title be made to all the partners by name, they hold the legal title as tenants in common, without survivorship. If to one partner alone, the whole legal title vests in him, which is the case, also, where the title is to a partnership name, which, as in this case, expresses the name of one party only, with the addition of '& Co.' If the deed be to a name adopted as the firm style, which includes the name of no party, it passes nothing in law. The same occurs where the deed is to one already dead."<sup>10</sup>

The reasons here given for holding that title passes only to those partners included in the firm name are not sound. They are founded on the theory that a partnership name is the name of an entity not recognized in law. The reason why a deed to a dead grantee fails is because the person intended to take is not in existence. But a partnership name is a compendious expression used instead of the names of the partners. It is actually a name indicating existing natural persons. This being so, the courts have been driven to seek another reason for the rule. This has been found in the uncertainty of the grantee intended by a partnership name and the consequent confusion of titles. Thus, in *Arthur v. Weston*,<sup>11</sup> the court, in holding that a conveyance of land to W. W. Phelps & Co. passed title to Phelps alone, declared that the question was "whether the partnership style is, as a matter of law, a good name of purchase in a conveyance of real property sufficient to pass the legal title to all the individuals of the firm." They answered the question by saying that, "a conveyance of real property being required by statute to be put in writing, the party who is to take as grantee must be sufficiently ascertained by the written instrument, or it is a nullity, so far as it purports to effect a transfer of the legal title."

<sup>10</sup> *Riffel v. Ozark Land & Lumber Co.*, 81 Mo. App. 177. See "*Partnership*," Dec. Dig. (Key No.) § 68; Cent. Dig. §§ 101-111.

<sup>11</sup> 22 Mo. 378. See "*Partnership*," Dec. Dig. (Key No.) § 68; Cent. Dig. §§ 101-111; "*Deeds*," Cent. Dig. § 288.

In *Winter v. Stock*,<sup>12</sup> the court held that a conveyance to "Louis Blanchard & Co." passed title to Louis Blanchard alone, saying: "A deed to a person by name 'and Company,' as to 'Louis Blanchard & Co.' contains no certain designation or description of any other person than Louis Blanchard, for the reason that the word 'Company' may describe one person as well as another." In *Gille v. Hunt*,<sup>13</sup> it was decided that a conveyance to "D. B. Dorman & Co." passed title to D. B. Dorman alone; the court saying with reference to a conveyance under general designations, such as "associates" and "& Co.": "There are some authorities which seem to hold that such a conveyance would be good to the persons so designated, and that it may be proved by parol who they are; but we think these cases go a great way towards holding that a conveyance of real estate may vest partly in parol, and when we consider the infinite confusion in titles to real estate, in which there ought to be great definiteness and certainty, such a rule might let in, we do not hesitate to decide that the proposition that such a designation is too indefinite and uncertain rests in better reason and authority."

There is no doubt that the reasoning of the last-mentioned cases is sound. The grantee in a conveyance of real estate should be certain. Yet there is much authority for the statement that a designation of the members of a partnership, either by a wholly fictitious name, or by one in which the names of some of the partners only appear, is sufficiently certain to enable all of the partners to take title under a conveyance in such name. That is certain which may be made certain. If a grantee is sufficiently described, so that the person meant may be identified, the grant is certain. Applying the maxim, it is said in *Sheppard's Touchstone*:<sup>14</sup> "And yet, if the grant do not intend to describe the grantee by his known name, but by some other

<sup>12</sup> 29 Cal. 407, 89 Am. Dec. 57. See "*Partnership*," *Dec. Dig. (Key No.)* § 68; *Cent. Dig.* §§ 101-111; "*Deeds*," *Cent. Dig.* § 288.

<sup>13</sup> *GILLE v. HUNT*, 35 Minn. 357, 29 N. W. 2, Gilmore, *Case Partnership*, 190. See "*Partnership*," *Dec. Dig. (Key No.)* § 68; *Cent. Dig.* §§ 101-111; "*Deeds*," *Cent. Dig.* § 288.

<sup>14</sup> *Sheppard's Touchstone*, p. 236.

matter, there it may be made good by a certain description of the person, without either surname or name of baptism." Accordingly it has been held that a conveyance to the "Lady Superior" of a convent passed the legal title to the person who was at the time of the conveyance the Lady Superior of the convent.<sup>15</sup> And it was held in *Hoffman v. Porter*,<sup>16</sup> by Marshall, J., sitting as circuit judge, that, as against demurrer to the complaint of John Hoffman, suing as surviving partner on the covenants contained in a deed to "Peter Hoffman & Son," John Hoffman was sufficiently designated in the deed to enable him to sue on the covenants contained therein. In Alabama it was held that a deed to "Stoudenmeier & Co." vested the legal title in the several members of the firm as tenants in common, and not in the name of the partnership as such. Its legal effect was the same as if the deed had been made to the three partners in their individual names.<sup>17</sup>

In *Byam v. Bickford*,<sup>18</sup> a deed was made to the "South Chelmsford Hall Associates." It was agreed that South Chelmsford Hall Association was meant. The court said: "It is probable that, in making the deed, it was supposed

<sup>15</sup> *Lady Superior v. McNamara*, 3 Barb. Ch. (N. Y.) 375, 49 Am. Dec. 184.

<sup>16</sup> Fed. Cas. No. 6,577. The court said: "That the word 'Son,' connected with other words which ascertain the son intended, is a word of purchase, has been very well settled. In all the conveyances in what is termed 'strict settlement,' a conveyance to A., remainder to the first, second, third, and fourth sons of B., has been considered as unquestionably valid. If these words are good to pass a remainder, I can perceive no reason why they might not pass a present estate. If, then, this conveyance had been to the 'first son' of Peter Hoffman, the estate might have passed to the first son. So, if he had been an only 'son.' But it is admitted that a conveyance to the son of A., he having several sons, would be void for uncertainty, and that no averment could make it good. The question then is whether there is anything in this deed to ascertain the son who is the purchaser. Peter Hoffman was in partnership with his son John, and the firm was known by the name of 'Peter Hoffman & Son.' I am disposed to think that this circumstance may designate the son intended in the deed." See "*Deeds*," *Cent. Dig.* § 288.

<sup>17</sup> *Brunson v. Morgan*, 76 Ala. 593. See "*Partnership*," *Dec. Dig. (Key No.)* § 68; *Cent. Dig.* §§ 101-111; "*Deeds*," *Cent. Dig.* § 288.

<sup>18</sup> 140 Mass. 31, 2 N. E. 637. See "*Associations*," *Cent. Dig.* § 20.

that, although unincorporated, this association, as such, was capable of taking and holding real estate. While there are certain unincorporated societies which may, as such, take and hold real estate by statute, this society does not belong to that class. The general rule, therefore, applies to it, and it is not qualified to take, as such, real estate as grantee. But the South Chelmsford Hall Association was a body well known, all the members of which could be ascertained, and, as it could not take as a corporation, the deed may properly be construed as a grant of the estate to those who were properly described by this title, especially as the grant is to the 'Associates,' a term deemed by the grantors to mean the same as 'Association.' The persons associated in the society were thus tenants in common of the land conveyed." In *Kelley v. Bourne*,<sup>19</sup> it was decided that a deed to a partnership called the "Grant's Pass Real Estate Association" passed at least an equitable title to the members of the partnership.<sup>20</sup>

In *Walker v. Miller*,<sup>21</sup> a partnership business in the name of James Webb, Jr., & Bro. was continued in the same name after the death of both members of the firm by the beneficial owners of their interests. A question arising as to the validity of a conveyance of real estate made to those owning the business in the partnership name, it was held that parol evidence might be given in order to ascertain the grantees.<sup>22</sup> From the above cases it may be seen

<sup>19</sup> 15 Or. 476, 16 Pac. 40. See "*Partnership*," *Dec. Dig. (Key No.)* § 68; *Cent. Dig.* § 105.

<sup>20</sup> *Spaulding Mfg. Co. v. Godbold*, 92 Ark. 63, 121 S. W. 1063. See "*Partnership*," *Dec. Dig. (Key No.)* § 68; *Cent. Dig.* §§ 101-111.

<sup>21</sup> 139 N. C. 448, 52 S. E. 125, 1 L. R. A. (N. S.) 157, 111 Am. St. Rep. 805. See "*Partnership*," *Dec. Dig. (Key No.)* § 68; *Cent. Dig.* §§ 101-111.

<sup>22</sup> The court saying: "It is sometimes said that only an equitable title is conveyed in such cases. The better view, we think, is that which we find sustained by the authorities cited—that the ambiguity is latent and open to explanation, by which the real party is disclosed and the deed treated as if the names were inserted. If, however, the other view be adopted, the same result would follow in this case. It is well settled under our judicial system that a party may recover in ejectment upon an equitable title."

It has been decided in a number of cases that where a mortgage

that there is strong authority for the proposition that a grant of land in the partnership name, whatever that name may be, passes title to all of the members of the partnership. But the objection of uncertainty is entitled to great weight. It certainly adds much to the difficulty of determining in whom the record title lies to permit several grantees to be named by a collective title.

of real estate creates a lien only, and is not a conveyance, a mortgage in the partnership name is good, and the lien accrues to the firm. *Chicago Lumber Co. v. Ashworth*, 28 Kan. 212; *Foster v. Johnson*, 39 Minn. 380, 40 N. W. 255; *Barber v. Crowell*, 55 Neb. 571, 75 N. W. 1109.

In *Barber v. Crowell*, supra, in determining the effect of a mortgage to the "Western Trust & Security Company," the court said: "On the assumption that the mortgagee was a partnership or unincorporated association, it is contended that it could not take title to real estate, and that the mortgage is therefore a nullity. It is undoubtedly true that a conveyance of land will be ineffectual to pass the legal title, unless made to a grantee having capacity to receive it; and it is also true that a partnership possesses no such capacity. But a mortgage is not a conveyance. It is a mere security in the form of a conditional conveyance, and the interest which it vests in the mortgagee is not essentially different from that created by a mechanic's lien or an ordinary judgment."

In *Foster v. Johnson*, supra, an action was begun to foreclose a mortgage to a firm composed of L. S. Blake and James Y. Elliott, the mortgage being given in the firm name, Blake & Elliott. The court held that the partners were sufficiently described to enable them to take. They held further, however, that this question was immaterial as a mortgage in the form of the one in question did not operate as a conveyance, distinguishing *GILLE v. HUNT*, 35 Minn. 357, 29 N. W. 2; *Gilmore, Cas. Partnership*, 190, in the following language: "But, in an action to foreclose, it is only necessary that there should be a lien, and no question can be made that a lien may accrue to a partnership in its firm name. In this respect there is a difference between a foreclosure under the power of sale and a foreclosure by action. In the former case the title must pass by virtue of the mortgage, and the mortgage must be sufficient to operate as a conveyance as soon as the equity of redemption is barred by the sale; but in the latter case the title passes by virtue of the decree and sale under it. There is no going behind the decree to ascertain if the mortgage was sufficient to operate as a conveyance." See "*Partnership*," *Dec. Dig. (Key No.)* § 68; *Cent. Dig.* §§ 101-111.

### CONVERSION OF PARTNERSHIP REALTY INTO PERSONALTY

53. By the doctrine of equitable conversion, the real estate of a partnership is, unless a contrary intention appears, deemed to be personal property.

It is a well-established maxim of equity that equity regards that as done which ought to be done. The most remarkable application of the principle of equity indicated by the maxim is found in what is called the "conversion" of property. Conversion has been defined as "that change in the nature of property by which, for certain purposes, real estate is considered as personal, and personal estate as real, and transmissible as such."<sup>23</sup> This change in the nature of property is dependent upon the intention of the owner, and if he has indicated an intention to alter his real property into personal property, or his personal property into real property, equity will treat the property as though the intention had been carried out.<sup>24</sup> When persons enter into partnership, there is an implied agreement that the partnership property shall be liable for firm debts. This means that it is agreed among them that as far as neces-

<sup>23</sup> Francis, *Maxims*, Max. 13; Pomeroy's *Equity Jurisprudence*, § 1159; *Green v. Smith*, 1 Atk. 572; *Lorillard v. Coster*, 5 Paige (N. Y.) 172. See "*Partnership*," *Dec. Dig. (Key No.)* §§ 68, 246; *Cent. Dig.* §§ 108, 522, 523; "*Conversion*," *Dec. Dig. (Key No.)* §§ 1-22; *Cent. Dig.* §§ 1-72.

<sup>24</sup> The rule as stated by Sir Thomas Sewell, in *Fletcher v. Ashburn*, 1 Brown's Chan. 497, is as follows: "Money directed to be employed in the purchase of land, and land directed to be sold and turned into money, are to be considered as that species of property into which they are directed to be converted; and this in whatever manner the direction is given, whether by will, by way of contract, marriage, articles, settlement, or otherwise, and whether the money is actually deposited or only covenanted to be paid, whether the land is actually conveyed or only agreed to be conveyed. The owner of the fund or the contracting parties may make land money or money land." See "*Partnership*," *Dec. Dig. (Key No.)* §§ 68, 246; *Cent. Dig.* §§ 108, 522, 523; "*Conversion*," *Dec. Dig. (Key No.)* §§ 1-22; *Cent. Dig.* §§ 1-72.

sary to pay the firm obligations the firm property may be turned into money. If the firm acquires real estate, it is acquired on this understanding. Carrying out the intention thus manifested by entering into the partnership, equity regards partnership real estate as personal property, at least as far as necessary to pay debts.

### SAME—EXTENT OF CONVERSION

54. Equitable conversion being based upon the intention of the partners, implied from the partnership agreement, the extent to which firm realty will be converted into personalty will depend upon the view taken by the court of such intention. A difference in view has led to the establishment of two rules, known, respectively, as the English and the American rule.

(1) English rule of out and out conversion: Partnership realty is, unless a contrary intention appears, converted for all purposes into personalty, and is administered and distributed according to the rules governing personal property.

(2) American rule of pro tanto conversion: Partnership realty is converted into personalty so far as is necessary for carrying on the firm business and the payment of the firm debts. The ordinary incidents of dower and descent attach, even in equity, to the surplus left after the partnership business is wound up and the partnership accounts are settled.

Special rule in Massachusetts: Partnership realty may be subjected to the payment of firm debts, but not pursuant to the doctrine of equitable conversion. Such realty is not converted at all, but is impressed with a trust for the benefit of the partnership and partnership creditors.

### *Conversion of Partnership Realty—Extent of Conversion Depends upon Agreement of Partners*

Since the conversion of partnership realty is a manifestation of the law of equitable conversion, and since equitable

conversion is based upon the intention of the parties, it follows that, if it can be shown that the partners so intended, the partnership realty will be held to be converted for all purposes.<sup>25</sup> Such an intention is most clearly indicated by means of an express agreement to that effect.<sup>26</sup> In the absence of an express agreement, the intention of the parties must be ascertained from their conduct, and, if there is nothing more, it must be ascertained from the nature and incidents of a partnership agreement. It is sometimes said that such an agreement may be inferred from the purpose for which particular real estate was purchased and used.<sup>27</sup>

<sup>25</sup> *Holladay v. Land & River Imp. Co.*, 57 Fed. 774, 6 C. C. A. 560; *Riddle v. Whitehill*, 135 U. S. 621, 10 Sup. Ct. 924, 84 L. Ed. 282; *Allen v. Withrow*, 110 U. S. 119, 3 Sup. Ct. 517, 28 L. Ed. 90; *Brown v. Slee*, 103 U. S. 823, 26 L. Ed. 618; *ROVELSKY v. BROWN*, 92 Ala. 522, 9 South. 182, 25 Am. St. Rep. 83, *Gilmore, Cas. Partnership*, 239; *DAVIS v. SMITH*, 82 Ala. 198, 2 South. 897; *Lenow v. Fones*, 48 Ark. 537, 4 S. W. 56; *Nicoll v. Ogden*, 29 Ill. 323, 81 Am. Dec. 311; *Maddock v. Astbury*, 32 N. J. Eq. 181; *Rosenbaum v. City of N. Y.*, 59 Misc. Rep. 30, 109 N. Y. Supp. 773; *DARROW v. CALKINS*, 154 N. Y. 503, 49 N. E. 61, 48 L. R. A. 209, 61 Am. St. Rep. 637, *Gilmore, Cas. Partnership*, 203; *Barney v. Pike*, 94 App. Div. 199, 87 N. Y. Supp. 1038; *Ludlow's Heirs v. Cooper's Devises*, 4 Ohio St. 1; *Leaf's Appeal*, 105 Pa. 505; *Frost v. Wolf*, 77 Tex. 455, 14 S. W. 440, 19 Am. St. Rep. 761; *Davis v. Christian*, 15 Grat. (Va.) 11; *Pierce's Adm'r v. Trigg's Heirs*, 10 Leigh (Va.) 406. "The question whether the interest of a partner in such real estate shall for purposes of distribution be treated as realty or personalty is incidental to the relation of copartnership. Its disposition is governed by express agreement, or that implied from the acts of the copartners." *Hiscock, J.*, in *Buckley v. Dolg*, 188 N. Y. 238, 80 N. E. 913. See "*Partnership*," *Dec. Dig. (Key No.)* §§ 68, 246; *Cent. Dig.* §§ 103, 522-523.

<sup>26</sup> *Wilson v. Holloway*, 3 Ch. 340; *THORNTON v. DIXON*, 3 Bro. Ch. 199; *DAVIS v. SMITH*, 82 Ala. 198, 2 South. 897; *Smith v. Jackson*, 2 Edw. Ch. (N. Y.) 28. See "*Partnership*," *Dec. Dig. (Key No.)* §§ 68, 246; *Cent. Dig.* §§ 103, 522-523.

<sup>27</sup> "The investment of partnership funds in lands and chattels for the purpose of a partnership business, the fact that the two species of property are in most cases of this kind so commingled that they cannot be separated without impairing the value of each, has been deemed to justify the inference that under such circumstances the lands as well as the chattels were intended by the partners to constitute a part of the partnership stock, and that both together should take the character of personalty for all purposes; and Judge Denio, in *Collumb v. Read* [24 N. Y. 505], expressed the

Equity seeks to give effect to the intention of the parties, and will convert firm realty into personalty to the extent indicated by such intention. In interpreting the agreement of the partners with respect to their intention as to the treatment of their real estate courts have differed, but the difference is as to the extent and not as to the principle of conversion. The differences may be expressed in two rules, which for convenience may be called the American and English rules, representing the weight of authority in each country.

*Same—English Rule*

The English rule may be stated as follows: Real property owned by a partnership becomes, as a consequence of such ownership, converted into personal property for all purposes. This is embodied in the Partnership Act, 1890, §§ 22 and 20 (2): Section 22. "Where land or any heritable interest therein has become partnership property, it shall, unless the contrary intention appears, be treated as between the partners (including the representatives of a deceased partner) and also as between the heirs of a deceased partner and his executors or administrators, as personal or movable and not real or heritable estate." Section 20 (2) provides "that the legal estate or interest in any land, or in Scotland the title to and interest in any heritable estate, which belongs to the partnership, shall devolve according to the nature and tenure thereof, and the general rules of law thereto applicable, but in trust, so far as necessary, for the persons beneficially interested in the land under this section."<sup>28</sup>

opinion that to this extent the English rule of conversion prevailed here. That paramount consideration should be given to the intention of the partners when ascertained is conceded by most of the cases." Andrews, C. J., in *DARROW v. CALKINS*, 154 N. Y. 503, 516, 49 N. E. 61, 64, 48 L. R. A. 290, 61 Am. St. Rep. 637, Gilmore, *Cas. Partnership*, 203. See "*Partnership*," *Dec. Dig. (Key No.)* §§ 68, 246; *Cent. Dig.* §§ 108, 522-523.

<sup>28</sup> The English cases were not uniform in sustaining the above rule, the following being opposed to it: *THORNTON v. DIXON*, 3 Bro. C. C. 199; *Bell v. Phyn*, 7 Ves. 453; *Randall v. Randall*, 7 Sim. 271; *Cookson v. Cookson*, 8 Sim. 529. The later cases and the majority of them were in favor of it, however. *Ripley v. Wa-*

The rule is "said to have grown out of the peculiar law of inheritance there (England), and to remedy the hardship of the rule which excludes all but the eldest child from the inheritance, and of the other rule which exempts real estate in the hands of the heir from all but the specialty debts of the ancestor."<sup>29</sup> These considerations may have influenced the English courts, in that they took them into consideration in determining what the parties intended; but there is no doubt that the immediate basis of the decisions establishing the rule which is above stated was the intention of the parties themselves. This is nowhere better indicated than in *Darby v. Darby*,<sup>30</sup> the reasoning in that case being as follows: In a court of equity the share of a partner, on the dissolution of the partnership, in the partnership property, is the amount of money that his share of the surplus amounts to after the partnership property has been sold and the partnership debts paid. Every partner has a right to demand that all the assets of the partnership shall be converted into money and no partner can be compelled to accept his share in specie. This right is inherent in the contract of partnership, and is as much a part of the contract as though expressly stipulated. It applies to all kinds of property, real as well as personal. It follows that all the real estate of partnership is acquired and held under the implied agreement that it shall be sold on dissolution of the partnership. If one agrees to sell land, such land is, in equity, considered as converted into personalty. Applying this rule to partnership realty, such

terworth, 7 Ves. 425; *Townsend v. Devaynes*, 1 Mont. Part. Appendix, p. 96; *Phillips v. Phillips*, 1 M. & K. 649; *Broom v. Broom*, 8 M. & K. 443; *Morris v. Kearsley*, 2 Y. & C. Ex. 189; *Houghton v. Houghton*, 11 Sim. 491; *DARBY v. DARBY*, 3 Drew. 495, *Gilmore, Cas. Partnership*, 193; *Essex v. Essex*, 20 Beav. 442; *Waterer v. Waterer*, 15 Eq. 402; *Murtagh v. Costello*, 7 L. R. Ir. 428; *Holroyd v. Holroyd*, 7 W. R. 420. See "*Partnership*," *Dec. Dig. (Key No.)* §§ 68, 246; *Cent. Dig.* §§ 108, 522-523.

<sup>29</sup> *DARROW v. CALKINS*, 154 N. Y. 503, 49 N. E. 61, 48 L. R. A. 299, 61 Am. St. Rep. 637, *Gilmore, Cas. Partnership*, 203. See "*Partnership*," *Dec. Dig. (Key No.)* §§ 68, 246; *Cent. Dig.* §§ 108, 522-523.

<sup>30</sup> *DARBY v. DARBY*, 3 Drew. 495, *Gilmore, Cas. Partnership*, 193. See "*Partnership*," *Dec. Dig. (Key No.)* § 68; *Cent. Dig.* § 108.

realty is in equity converted into personalty for all purposes.<sup>81</sup>

*Same—American Rule*

Both the English and American courts which recognize the doctrine of conversion proceed upon the theory of giving effect to the intention of the partners, implied from the partnership agreement. The difference lies in the implication the courts of the two countries make, respectively, as to the partners' agreement with respect to the treatment of the firm real estate; the English courts holding, on the one hand, that the partners contemplated and impliedly agreed that upon dissolution all the firm assets, real and personal, should be turned into cash for payment of debts and distribution. The American courts hold, on the other hand, that the partners did not thus contemplate and impliedly agree, but rather intended that firm realty should continue such, and upon dissolution be divided in kind, subject only to being converted into personalty if necessary for the carrying on of the firm business and for the payment of firm debts. The reason for thus interpreting the intention of the partners seems to be found in the nature of the property. Personal property, while capable of being divided in kind upon a dissolution of the firm, is not usually so divided, but is turned into cash. Real estate, on the other hand, is easily partitioned, and is usually divided in kind. The partners therefore intended upon dissolution to divide the two kinds of property in the usual way. This reason is stated in *Shearer v. Shearer*:<sup>82</sup> "In relation to personal property, there is a practical difficulty in this respect. The law recognizes it, and, upon the death of one

<sup>81</sup> "From the principle that a share of a partner is nothing more than his proportion of the partnership assets after they have been turned into money and applied in liquidation of the partnership debts, it necessarily follows that, in equity, a share in a partnership, whether its property consist of land or not, must, as between the real and personal representatives of a deceased partner, be deemed to be personal, and not real estate, unless, indeed, such conversion is inconsistent with the agreement between the parties." *Lindley, Partnership*, \*343.

<sup>82</sup> *SHEARER v. SHEARER*, 98 Mass. 107, 115. See "*Partnership*," *Dec. Dig. (Key No.)* §§ 68, 246; *Cent. Dig.* §§ 108, 522½.

partner, vests the whole title in the survivor. Even during the continuance of the copartnership, one partner may transfer the entire title of the firm by sale of any of its personal property in the course of its business. In regard to such property, the rule that it is to be in all cases converted into money is undoubtedly well established and entirely uniform everywhere. In this equity follows the analogies of the law. On the other hand, neither partner can convey the interest of his copartner in real estate. The law provides for its transmission in undivided shares; for its partition; for its descent to the heirs of a deceased partner. It seems to us best to accord with the general principles of equitable interference that equity should recognize the division of real estate held by copartners as already effected by operation of law, unless and except so far as the terms of the copartnership and the state of the accounts require its interposition in order to make the legal title conform to the equitable or beneficial interest. When this is accomplished, equity has no longer any office to perform towards it."

Perhaps a more fundamental reason is found in the unconscious recognition of the firm as an entity, usually expressed by saying that the interest of a partner in partnership property pertains not to any tangible property, but only to the surplus which remains after the partnership debts are paid and its affairs wound up. Since firm real estate need not ordinarily be sold upon dissolution in order to effect a division, there is no reason for implying an agreement of the partners that it should be sold. But it clearly was the intention that all the firm assets of every kind be available for the purposes of firm business and for the payment of the firm debts, and, in converting the realty into personalty, equity is merely carrying out the implied agreement of the partners. Therefore the general rule in the United States is that partnership realty is to be considered as converted into personalty only so far as may be necessary for the carrying on of the firm business and for the payment of the firm debts.<sup>33</sup> As the rule is sometimes

<sup>33</sup> *DARROW v. CALKINS*, 154 N. Y. 503, 49 N. E. 61, 48 L. R. A. 299, 61 Am. St. Rep. 637, *Gillmore, Cas. Partnership*, 203; *SHANKS*

stated, the conversion is limited to the payment of firm debts. It would seem, however, that conversion for all the purposes of the partnership, including the payment of debts, is more correct. That some courts recognize a conversion to this extent is manifest in the dower cases to be noticed presently.<sup>54</sup>

Equity only regards the real estate of a partnership as personal property for the purpose of carrying on the firm business and paying the debts and settling the accounts of the partners. In other respects it retains its legal incidents,<sup>55</sup> both at law and in equity.<sup>56</sup>

*Special Rule in Massachusetts*

Though the rights of the partners inter se and of firm creditors in the firm realty are usually worked out through an equitable conversion of the realty, such rights are not infrequently spoken of as being based upon a trust arising out of the partnership relationship. This is notably true in Massachusetts, where it is held that there is no conversion at all, and that the rights of partners and creditors are based upon a trust, the existence of which does not depend upon the intention of the parties. This view is thus stated in *Shearer v. Shearer*:<sup>57</sup> "Conceding the agreement as supposed (in *Darby v. Darby*) either express (provided it be not in writing) or implied, it is not such a contract as

v. KLEIN, 104 U. S. 18, 26 L. Ed. 635, Gilmore, Cas. Partnership, 269; DAVIS v. SMITH, 82 Ala. 198, 2 South. 897; Morrill v. Colehour, 82 Ill. 618; Whitney v. Cotten, 53 Miss. 689; Campbell v. Campbell, 30 N. J. Eq. 415; Mann v. Paddock, 108 Va. 827, 62 S. E. 951. See "Partnership," Dec. Dig. (Key No.) §§ 68, 246; Cent. Dig. §§ 108, 522-523.

<sup>54</sup> See post, p. 167.

<sup>55</sup> *Schlichter Jute Cordage Co. v. Mulqueen* (C. C.) 142 Fed. 583; *Powers v. Robinson*, 90 Ala. 225, 8 South. 10; *Lenow v. Fones*, 48 Ark. 557, 4 S. W. 56; *Pepper v. Pepper*, 24 Ill. App. 316; *Collumb v. Read*, 24 N. Y. 505; *Dawson v. Parsons*, 10 Misc. Rep. 428, 31 N. Y. Supp. 78; *Martin v. Morris*, 62 Wis. 418, 22 N. W. 525. See "Partnership," Dec. Dig. (Key No.) §§ 68, 246; Cent. Dig. §§ 108, 522-523.

<sup>56</sup> *Flanagan v. Shuck*, 82 Ky. 617. See "Partnership," Dec. Dig. (Key No.) § 68; Cent. Dig. § 108.

<sup>57</sup> *SHEARER v. SHEARER*, 98 Mass. 107, 116. See "Partnership," Dec. Dig. (Key No.) §§ 68, 246; Cent. Dig. §§ 108, 522-523.

entitles the parties to a specific performance, and it does not create the trust required for the conversion of real estate. The statute demands a written agreement for that purpose. Gen. St. c. 100, § 19.<sup>88</sup> The English statutes seem equally to require it. The implied trust, which is enforced in equity for the adjustment of partnership obligations, results from the investment of the funds of the partnership in the real estate in question, for the use of the partnership. Regarding it in that light, the court have but to inquire to what use the funds, represented in the land, are devoted; to whom and in what proportions the beneficial interests belong; and the execution of the trust will follow according to the nature of the rights to be secured. It is not necessary to resort to inventions to work out the equities of the case through some implied contract, or supposed intentions of the parties in entering into the relation of partnership, or in applying it to the ownership of land. The ordinary, well-known, and generally recognized principles of equity, as applied to trusts arising by implication of law, are sufficient for all the requirements of that relation."

The reasoning here given is radically different from that of the cases upon which the doctrine of conversion is based. Here there is no conversion, but the real estate continues as real estate, subject to being changed with a trust to discharge from debts. The result reached under this doctrine is not apparently greatly different from that reached under the pro tanto conversion rule. In each case the real estate is liable for the firm debts, and in each case the surplus, after debts are paid and accounts are settled, descends

<sup>88</sup> "A question, however, is made and concerning which some doubt arises from the conflict in decided cases. Will anything short of an express covenant in the partnership articles have the effect in equity of converting realty into personalty to all intents? We see no good reason for holding that an agreement in writing is necessary for such conversion. Undoubtedly the intention to convert out and out should be made to appear clearly; but such intention may be inferred from circumstances with sufficient clearness." McIlvaine, J., in *Rammelsberg v. Mitchell*, 29 Ohio St. 22, 53. See "*Partnership*," *Dec. Dig. (Key No.)* §§ 68, 246; *Cent. Dig.* §§ 108, 522-523.

to the heirs of a deceased partner, free from trust or equitable obligation.<sup>30</sup>

*Position of the Legal Title*

It must be remembered that the doctrine of conversion is an equitable one, as is also the doctrine that each partner is endowed with an equity against the firm property for the payment of firm debts. Neither in any way affects the legal title. That passes either by virtue of a conveyance good under the Statute of Frauds, by judicial decree, or, in certain situations, by operation of law. The inception or dissolution of a partnership does not constitute one of those situations. The legal title to real property is not affected in any way by the fact that it may be partnership property, though the fact that those owning it are partners may prevent them from using it as ordinary joint owners could, and though it may in equity be subjected to incidents that joint property is not ordinarily subject to. This is due to the necessity of being able to establish a record title. The facility and informality with which a partnership can be created and dissolved, with which it can convert separate property into joint property and convert joint property into several property, and with which it can convert real property into personal property, in the view of a court of equity, would destroy the stability of record titles, if any of those things were permitted to affect them. Hence, so far as the question of title to land is concerned, partnership land is conceived of as being held either in joint tenancy or tenancy in common. These relationships being only incident to the holding of the legal title to land and consequent upon it, they have no tendency to cause confusion in titles. Though the fact of the existence of a partnership does not affect the legal title to land held by the partnership, since the same fact, notably the death of a partner, may cause a dissolution of the partnership and a devolution of the title to land held by the partnership, it

<sup>30</sup> *Lenow v. Fones*, 48 Ark. 557, 4 S. W. 56; *SHEARER v. SHEARER*, 98 Mass. 107; *Scruggs v. Blair*, 44 Miss. 406; *Buchan v. Sumner*, 2 Barb. Ch. (N. Y.) 199, 47 Am. Dec. 305. See "*Partnership*," *Dec. Dig. (Key No.)* §§ 68, 246; *Cent. Dig.* §§ 108, 522-523, 704.

may make considerable difference in winding up a partnership, on the death of one partner, whether partnership land is conceived of as being held in joint tenancy or in tenancy in common.

In England the view seems to be that the legal title of partners is held in joint tenancy. Hence, on the death of one of the members of the firm, the legal title to his undivided interest of the partnership survives to the other members of the firm in whose name the legal title to the rest of the land stands.<sup>40</sup> In case the legal title is all in one partner, it passes on his death to his personal representative.<sup>41</sup> In this country joint tenancy is not favored,<sup>42</sup> and it is generally held that partners hold the legal title to firm realty as tenants in common, and on the death of one of the partners the legal title to his share of the firm realty passes to his heirs.<sup>43</sup> It passes to them subject to be applied to the firm debts.

<sup>40</sup> *JEFFEREYS v. SMALL*, 1 Vern. 217, Gilmore, Cas. Partnership, 266; *Elliot v. Brown*, 3 Swans. 489, note. See "*Partnership*," *Dec. Dig. (Key No.)* § 246; *Cent. Dig.* §§ 519-523.

<sup>41</sup> Land Transfer Act, 1897 (60 & 61 Vict. c. 65) § 1.

<sup>42</sup> See Joint Tenancy and Tenancy in Common, chapter I, pp. 42-43.

<sup>43</sup> *SHANKS v. KLEIN*, 104 U. S. 18, 28 L. Ed. 635, Gilmore, Cas. Partnership, 269; *Perin v. Megibben*, 53 Fed. 86, 3 C. C. A. 443, 6 U. S. App. 348; *Megibben's Adm'rs v. Perin* (C. C.) 49 Fed. 183; *Clay v. Field* (D. C.) 34 Fed. 375; *Logan v. Greenlaw* (C. C.) 25 Fed. 299; *Walton v. Atkinson* (Ala.) 51 South. 826; *Blanchard v. Floyd*, 98 Ala. 53, 9 South. 418; *ANDREWS' HEIRS v. BROWN'S ADM'R*, 21 Ala. 437, 56 Am. Dec. 252; Gilmore, Cas. Partnership, 267; *Percifull v. Platt*, 36 Ark. 456; *Dupuy v. Leavenworth*, 17 Cal. 262; *Loubat v. Nourse*, 5 Fla. 350; *Galbraith v. Gedge*, 16 B. Mon. (Ky.) 631; *Flanagan v. Shuck*, 82 Ky. 619; *Casky v. Casky*, 5 Ky. Law Rep. 775; *Holmes v. Self*, 79 Ky. 297; *Lowe v. Lowe*, 13 Bush (Ky.) 688; *Goodburn v. Stevens*, 5 Gill (Md.) 1; *Wilcox v. Wilcox*, 13 Allen (Mass.) 252; *Howard v. Priest*, 5 Metc. (Mass.) 582; *DYER v. CLARK*, 5 Metc. (Mass.) 562, 39 Am. Dec. 697, Gilmore, Cas. Partnership, 196; *Hanway v. Robertshaw*, 49 Miss. 758; *Scruggs v. Blair*, 44 Miss. 406; *Buchan v. Sumner*, 2 Barb. Ch. (N. Y.) 165, 47 Am. Dec. 305; *DELMONICO v. GUILLAUME*, 2 Sandf. Ch. (N. Y.) 266; *Buckley v. Buckley*, 11 Barb. (N. Y.) 43; *Smith v. Jackson*, 2 Edw. Ch. (N. Y.) 28; *Rammelsberg v. Mitchell*, 29 Ohio St. 22; *Greene v. Graham*, 5 Ohio, 264; *Summey v. Patton*, 60 N. C. 601, 86 Am. Dec. 451; *Yeatman's Heirs v. Woods*, 6 Yerg. (Tenn.) 20, 27 Am. Dec.

What influence the holding as to the legal title may have had on the respective rights of the heirs and the personal representatives of a deceased partner in his share of the surplus of the firm realty it is difficult to say. That it may have had some in this country, at least, seems probable; for, the title once being in the heir, equity would not be inclined to disturb it in favor of the personal representative, whose equity would be no greater than that of the heir.<sup>44</sup>

*Effect on Dower*

The right of a wife to dower in her husband's property is a legal right, and attaches in law to the property of which the husband is legally seised during her coverture. It is, however, subject to the equities and incumbrances which might be urged against the husband. Thus, if the husband acquires property as trustee, though in a court of law the wife might urge her right of dower, her recovery would be enjoined by a court of equity.<sup>45</sup> Where an equitable defense can be pleaded in a court of law, the right of dower in trust property in effect ceases to exist.

If a vendor contracts to sell land, he becomes, until the conveyance is made, a trustee of the land for the vendee, and the land in his hands is, in equity, regarded as having the character of the property with which it is to be replaced; i. e., of personalty. Hence, if a man contracts to sell land before marriage, then marries before conveyance, his wife is not entitled to dower in such land.<sup>46</sup> The same

452; *Williamson v. Fountain*, 7 Baxt. (Tenn.) 212; *Murrell v. Mandelbaum*, 85 Tex. 22, 19 S. W. 880, 34 Am. St. Rep. 777; *Pierce's Adm'r v. Trigg's Heirs*, 10 Leigh (Va.) 406.

But see *French v. Vanatta*, 83 Ark. 306, 104 S. W. 141. See "*Partnership*," *Dec. Dig. (Key No.)* §§ 68, 246; *Cent. Dig. §§ 101-111, 519-523*.

<sup>44</sup> *SHEARER v. SHEARER*, 98 Mass. 107. See "*Partnership*," *Dec. Dig. (Key No.)* § 246; *Cent. Dig. §§ 519-523*.

<sup>45</sup> *Noel v. Jevon*, 2 Freem. 43; *Hinton v. Hinton*, 2 Ves. Sr. 630, 634; *Cashborn v. English*, 2 Eq. Ca. Abr. 728; *Cowman v. Hall*, 3 Gill & J. (Md.) 398; *Small v. Procter*, 15 Mass. 495; *Coster v. Clarke*, 3 Edw. Ch. (N. Y.) 428; *Derush v. Brown*, 8 Ohio, 412; *Firestone v. Firestone*, 2 Ohio St. 415. See "*Dower*," *Dec. Dig. (Key No.)* §§ 11-19; *Cent. Dig. §§ 18, 36-65*.

<sup>46</sup> *Roper, Husb. & Wife* (by Jacob) 358; *Dean's Heirs v. Michell's Heirs*, 4 J. J. Marsh (Ky.) 451; *Oldham v. Sale*, 1 B. Mon. (Ky.) 76;

is true where land is bought under an agreement to resell. It never becomes, in the view of a court of equity, realty to which dower attaches.<sup>47</sup>

It must also be noted that dower does not attach to land held by the husband in joint tenancy.<sup>48</sup>

#### *Same—English Rule*

As to dower in partnership, it seems clear that in England the wife of a partner gets no right of dower in partnership land, either because of the way in which the legal title is held, or because of the fact that it is held to be converted into personalty.<sup>49</sup>

*Gaines v. Gaines' Ex'r*, 9 B. Mon. (Ky.) 295, 48 Am. Dec. 425; *Rawlings v. Adams*, 7 Md. 26; *Bowie v. Berry*, 3 Md. Ch. 359; *Cowman v. Hall*, 3 Gill & J. (Md.) 398; *Firestone v. Firestone*, 2 Ohio St. 415; *Adkins v. Holmes*, 2 Cart. (Ind.) 197. See "*Dower*," *Dec. Dig. (Key No.)* §§ 11-19; *Cent. Dig.* §§ 18, 36-65.

<sup>47</sup> In *Coster v. Clarke*, 3 Edw. Ch. (N. Y.) 428, five persons purchased real estate, title being taken in the name of Clarke, one of the number, under an agreement to resell the same at a profit. On the question of the right of the wife of Clarke to dower, the court said: "The lands were bought in the first instance with moneys, to a large amount, advanced by Mr. Coster, and some by Mr. Butler, under an agreement which was embodied in the written instrument before mentioned of the 17th of August, 1826. This agreement preceded or was simultaneous in effect with the purchases and the vesting of the title in James B. Clarke. The purchases were based upon it, or were made with reference to its provisions; and from the very inception of Mr. Clarke's title and legal seisin the trust attached; and from that moment the property became converted into personalty, leaving nothing for the wife's right of dower to attach to, except in subordination to the trusts." See "*Dower*," *Dec. Dig. (Key No.)* §§ 11-19; *Cent. Dig.* §§ 18, 36-65.

<sup>48</sup> "The wife shall not be endowed of lands or tenements which the husband holdeth jointly with another at the time of his death; and the reason of this diversity is, for that the joint tenant, which surviveth, claimeth the land by the feoffment and by survivorship, which is above the title of dower, and may plead the feoffment made to himself, without naming of his companion that died." Coke on Littleton, lib. 1, c. 5, § 45; *Mayburry v. Brien*, 15 Pet. 21, 10 L. Ed. 646. See "*Dower*," *Dec. Dig. (Key No.)* § 16; *Cent. Dig.* § 61.

<sup>49</sup> *Conger v. Platt*, 25 N. S. Q. B. 277; *Houghton v. Houghton*, 11 Sim. 491; *Morris v. Kearsley*, 2 Younge & C. 139. See "*Dower*," *Dec. Dig. (Key No.)* § 17; *Cent. Dig.* § 62.

*Same—American Rule*

In this country the question is more difficult. The manner of the holding of the legal title does not prevent dower from attaching. It must be barred, then, in equity, if at all. That it would be barred there, if the real estate of a firm were conceived as being converted into personalty for all purposes, there is no doubt. Since it is generally held that it is only converted for the necessities of the partnership, or that a trust is imposed upon it for those purposes, it is held that as to the rest, which descends to the heirs of a deceased partner, his widow is entitled to dower.<sup>50</sup>

*Same—When Dower Attaches*

The question as to when the dower attaches is one of some perplexity. Does it attach to the entire interest of a partner in the real estate, subject to being displaced on a showing that it is needed to pay the debts of the firm, or does it only attach to the surplus remaining after the debts are paid? The better rule and the majority holding would seem to be that it does not attach in equity till all of the firm debts are paid. Any other rule would seriously hamper the business of the partnership.<sup>51</sup>

<sup>50</sup> *Perlin v. Megibben*, 53 Fed. 86, 3 C. C. A. 443; *Holton v. Guinn* (C. C.) 65 Fed. 450; *Espy v. Comer*, 76 Ala. 501; *Drewry v. Montgomery*, 28 Ark. 256; *GALBRAITH v. TRACY*, 153 Ill. 54, 38 N. E. 937, 28 L. R. A. 129, 46 Am. St. Rep. 867; *Pepper v. Pepper*, 24 Ill. App. 316; *Grissom v. Moore*, 106 Ind. 296, 6 N. E. 629, 55 Am. Rep. 742; *HUSTON v. NEIL*, 41 Ind. 504, *Gilmore*, Cas. Partnership, 200; *SHEARER v. SHEARER*, 98 Mass. 107; *Campbell v. Campbell*, 30 N. J. Eq. 415; *Buchan v. Sumner*, 2 Barb. Ch. (N. Y.) 165, 47 Am. Dec. 305; *Dawson v. Parsons*, 10 Misc. Rep. 428, 31 N. Y. Supp. 78; *Greenwood v. Marvin*, 111 N. Y. 423, 19 N. E. 228; *Mowry v. Bradley*, 11 R. I. 370. See "*Dower*," *Dec. Dig. (Key No.)* § 17; *Cent. Dig.* § 62.

<sup>51</sup> This is clearly pointed out by Mitchell, J., in *WOODWARD-HOLMES CO. v. NUDD*, 58 Minn. 236, 239, 59 N. W. 1010, 1011, 27 L. R. A. 340, 49 Am. St. Rep. 503. "It is now held with practical unanimity by the American courts that, if partnership capital be invested in land for the benefit of the company, all the incidents attach to it which belong to any other stock, so far as consistent with the statute of frauds and the technical rules of conveyancing, and that it will be treated as personal estate until it has performed all its functions to the partnership, and thereby ceases to be any

An early New York case held that dower attached immediately to the partnership land of the husband as an incident to the legal estate and seisin; that in consequence it was necessary for the wife to join in a mortgage; that after a mortgage had been given she had a right of dower in the equity of redemption, which was not entirely lost

longer partnership property, and until then it is not subject to either dower or inheritance, but that, after all the purposes of the partnership have been thus accomplished, whatever land remains in specie will be regarded as real estate. The question is: At what precise moment is it reconverted into real estate, or, to speak more accurately, does it resume all the attributes and incidents of real property? We think the answer is: The moment the partnership is terminated and wound up by judgment or agreement, and it is determined that it no longer forms a part of the partnership stock, and is not required for its purposes. When a partnership is dissolved and its affairs wound up and completely ended, and any land remains in specie, unconverted, this must be deemed a determination that it is no longer a part of the partnership stock, and an election to hold it thereafter, individually, as real estate. During the continuance of the partnership the partners can convey or mortgage it, in the course of their business, whenever they see fit, without their wives joining in the conveyance or mortgage, and the wives would have no dower or other interest in it. This is one of the very objects of treating partnership real estate as personal property; for otherwise the business of the firm might be stopped, and the partners unable to realize on the assets of the firm, by reason of the wife of one of them refusing to join in the conveyance or mortgage. They have the same power of disposition over it for the purposes of a dissolution of the partnership, the payment of its debts, and the distribution or division of the capital among themselves; for until that is done the property has not fulfilled its functions as personalty, or ceased to be partnership property. And what the partners may thus do voluntarily the court may do for them, in an action brought to dissolve the partnership and wind up its affairs. \* \* \* The error which lies at the foundation of the whole argument of defendant's counsel is in the assumption that, at the time of the purchase of this property, it became the individual real estate of the husband, and that the inchoate right of the wife under the statute immediately attached, subject only to a lien for the payment of partnership debts. This is not correct, and none of the authorities that we have found so hold. The fact is that only so much of it becomes the individual real estate of the partner as remains in specie, unconverted, after all the purposes of the partnership have been entirely fulfilled, and it is only to such of it that any inchoate interest of the wife ever attaches.

by foreclosure and sale.<sup>52</sup> The case is not, however, consistent with later New York decisions, and the question of the necessity of a wife joining in a conveyance of partnership land has been decided in the negative in the New York Supreme Court;<sup>53</sup> the court saying, with reference to the earlier case: "In so far as the case of *Smith v. Jackson* holds that dower attaches to such real estate, it is only correct in a modified sense. So long as the partnership exists, the real estate owned by it is in equity considered personal property, subject to firm debts, and to the interests of each partner in the firm, and it is only after the partnership ceases to exist, the copartnership debts have been paid, and the individual interests of the copartners adjusted and settled, as between themselves, that the real estate or the proceeds thereof are treated or considered as real estate to which dower can attach."

In Massachusetts and in some other states it would seem that the right of dower attaches at once, and that the wife is a necessary party to conveyances of firm real estate.<sup>54</sup>

If counsel's contention is correct, the partners could never, even during the active life of the copartnership, convey perfect title to partnership land without their wives joining, except to the extent actually necessary to pay existing debts of the firm. This would practically involve, in every case where one of the wives refused to join in a conveyance, the necessity of a suit to which she is made a party, in order to determine whether the sale was necessary to pay debts. Any such rule would hamper the business of the firm to an extent that might practically defeat the purposes of the partnership."

See, to the same effect, the dictum of the court in *Walling v. Burgess*, 122 Ind. 299, 304, 22 N. E. 419, 23 N. E. 1076, 7 L. R. A. 481; *HUSTON v. NEIL*, 41 Ind. 504, *Gilmore, Cas. Partnership*, 200. Also *Hauptmann v. Hauptmann*, 91 App. Div. 197, 86 N. Y. Supp. 427; *Paige v. Paige*, 71 Iowa, 318, 32 N. W. 360, 60 Am. Rep. 799; *Hamilton v. Halpin*, 68 Miss. 99, 8 South. 739; *Parrish v. Parrish*, 88 Va. 529, 14 S. E. 325. See "*Dower*," *Dec. Dig. (Key No.)* § 17; *Cent. Dig.* § 62.

<sup>52</sup> *Smith v. Jackson*, 2 Edw. Ch. (N. Y.) 28. See "*Dower*," *Dec. Dig. (Key No.)* §§ 10, 15; *Cent. Dig.* §§ 18, 32, 33, 57-60.

<sup>53</sup> *Dawson v. Parsons*, 10 Misc. Rep. 428, 31 N. Y. Supp. 78, 80. See "*Dower*," *Dec. Dig. (Key No.)* §§ 10, 15; *Cent. Dig.* §§ 18, 32, 33, 57-60.

<sup>54</sup> *DYER v. CLARK*, 5 Metc. (Mass.) 562, 39 Am. Dec. 697, *Gilmore, Cas. Partnership*, 196; *Bowman v. Bailey*, 20 S. C. 553; *Lenow v.*

### NATURE AND EXTENT OF PARTNER'S INTEREST IN PARTNERSHIP PROPERTY

55. The characteristic features of an estate in partnership are the following:

- (a) The title to partnership property is in all of the partners jointly, but the partners are neither
  - (1) Tenants in common,
    - (I) Because a sale of a partner's interest does not pass an undivided interest in the property, but only such partner's share of what remains after all partnership debts are paid, and
    - (II) Because a sale of specific partnership property by a partner passes the whole title, and not simply the seller's individual interest, nor
  - (2) Joint tenants,
    - (I) Because there is no beneficial survivorship, and
    - (II) Because one partner can sell partnership property in the lifetime of his copartners.
- (b) A partner's share simply entitles him to a given proportion of what remains after all the firm debts have been paid.
- (c) A partner is not entitled to a partition or division of the property in kind.

There has been always a question as to the nature of partnership property; that is, whether this property is an estate in common or one in joint tenancy, inasmuch as it is characterized by features found in both. It is held by all the partners, and since it is the substantial effect of individual contributions of money or service, as the case may be, it is difficult to understand at first that the individuals

Fones, 48 Ark. 557, 4 S. W. 56; Pugh's Heirs v. Currie, 5 Ala. 446; Brewer v. Browne, 68 Ala. 210; Collins v. Warren, 29 Mo. 238. See "Dower," *Dec. Dig. (Key No.)* §§ 10, 15; *Cent. Dig.* §§ 18, 32, 33, 57-60.

do not own it each in the ratio of his separate interest in the business.<sup>55</sup>

*Partners are Not Tenants in Common of the Firm Property*

It might appear that here is unity of possession, and since, after the partnership shall have been dissolved, each will be restored his proportion again, instead of all the property going into the estate of the survivor, and since any one of the partners may convey his share to a stranger meantime, there seems to be an absence of that survivorship without which there can be no estate in joint tenancy. But, while the property thus is held by all the partners, it is held by them as members of their firm; and, just as has been said of the partnership capital, so it is to be said of partnership property, generally, that a partner does not own any part of it.<sup>56</sup> Partners are not tenants in common. For while a partner may, as was said above, convey his share to a stranger, the stranger will take nothing whatsoever by the conveyance until after a dissolution of the partnership, and a settlement with the partnership creditors, to whom he is postponed.<sup>57</sup> Even if a personal judgment is

<sup>55</sup> T. Para. Partn. (4th Ed.) § 255, says: "What, then, is the right or interest or property of a partner to or in the effects of the partnership? Certainly, not a separate and exclusive right to any part or portion of it, or any right of any kind to any one part rather than to any other part, or any other right or interest than that which all the other partners have. It follows, therefore, that he can have no right or interest which is such in kind or in degree as prevents all or any of his copartners from having precisely the same; and the right which he has is the same as theirs in reference to the whole and every part of the property. We cannot, therefore, define this right of any one partner better than we have already done, by calling it an ownership of all the property of the firm, subject to the ownership of the copartners, who hold it all subject to his ownership. This is at least the foundation of his property and interest; and from this he derives certain rights as incident to it."

<sup>56</sup> *Lingen v. Simpson*, 1 Sim. & S. 600; *Cockle v. Whiting*, Tam. 55; *Fourth Nat. Bank v. New Orleans & C. R. Co.*, 11 Wall. 624, 20 L. Ed. 82; *United States v. Hack*, 8 Pet. 271, 8 L. Ed. 941. See "*Partnership*," *Dec. Dig. (Key No.)* §§ 67-69, 76; *Cent. Dig.* §§ 95-113, 116, 124.

<sup>57</sup> *MENAGH v. WHITWELL*, 52 N. Y. 146, 11 Am. Rep. 683, *Gilmore Cas. Partnership*, 251; *Carrie v. Cloverdale Banking & Commercial*

recovered against a partner for a private debt, and execution follows the judgment, a levy on the partner's share will affect nothing but what it may afterwards appear that the partner is entitled to; that is, after the dissolution of the partnership, the payment of all the firm creditors, and a determination of the share of the partner in the property that remains.<sup>58</sup> For that is the significance of the word "share," as used in such a connection; it having been well defined as "the value of his (partner's) original contribution, increased or diminished by his share of profit or loss."<sup>59</sup> But then the effect of a sale of property by an individual is very different, where such individual is a tenant in common with the person interested with him in the ownership of the property, from what it is where he is his partner in such ownership. Thus, in the case of *Person v. Wilson*,<sup>60</sup> there was a question whether a partnership or a tenancy in common subsisted between certain individuals, because, all the property having been sold by one of them, the sale would, on the latter hypothesis, have carried only the seller's individual interest.<sup>61</sup> In another case the rights of a purchaser from a member of a defunct partnership of a

Co., 90 Cal. 84, 27 Pac. 58; *SINDELARE v. WALKER*, 137 Ill. 43, 27 N. E. 59, 31 Am. St. Rep. 353; *Collins' Appeal*, 107 Pa. 590, 52 Am. Rep. 479; *Durborrow's Appeal*, 84 Pa. 404; *Whigham's Appeal*, 63 Pa. 194. But such a purchaser takes whatever would have been due his vendor in preference to the latter's unsecured creditors. *Thompson v. Spittle*, 102 Mass. 207. He does not become a tenant in common. *Donaldson v. President, etc., of State Bank*, 16 N. C. 103, 18 Am. Dec. 577; *Fourth Nat. Bank v. New Orleans & C. R. Co.*, 11 Wall. 624, 20 L. Ed. 82. See "*Partnership*," *Dec. Dig. (Key No.)* §§ 67-69, 76, 77; *Cent. Dig.* §§ 95-113, 116, 124, 125, 145.

<sup>58</sup> *TAYLOR v. FIELDS*, 4 Ves. 396, *Gillmore, Cas. Partnership*, 210; *Fourth Nat. Bank v. New Orleans & C. R. Co.*, 11 Wall. 624, 20 L. Ed. 82; *SANBORN v. ROYCE*, 132 Mass. 594, *Gillmore, Cas. Partnership*, 510; *Reinheimer v. Hemingway*, 35 Pa. 432. See "*Partnership*," *Dec. Dig. (Key No.)* §§ 67-69, 76, 184-189; *Cent. Dig.* §§ 95-113, 116, 124, 337-348.

<sup>59</sup> *Indian Contract Act*, § 253.

<sup>60</sup> 25 Minn. 189, 194. See "*Partnership*," *Dec. Dig. (Key No.)* §§ 77, 138, 141, 153; *Cent. Dig.* §§ 125, 145, 214-221, 275, 306; "*Tenancy in Common*," *Dec. Dig. (Key No.)* § 27; *Cent. Dig.* § 72.

<sup>61</sup> *Thompson v. Bowman*, 6 Wall. 316, 18 L. Ed. 736; *Mersereau v. Norton*, 15 Johns. (N. Y.) 180. See "*Partnership*," *Dec. Dig. (Key*

judgment in favor of the latter, which judgment had been previously sold by the firm's assignee to a person secretly representing the partners, were sustained on the ground that the sale of the successful party had been made by a partner, and not a tenant in common;<sup>62</sup> not, of course, a partner as of the old firm, but in respect of the transaction of buying and selling the judgment.

*Partners are Not Joint Tenants of the Firm Property*

Close examination into the question results in little that is more substantial where the claim is made that firm property is held in joint tenancy. To be sure, so far as concerns the existence of some sort of survivorship, this claim has a semblance of a basis; for, if the partner dies, the whole property goes to the surviving copartner, instead of going proportionably to the executor of the deceased. It has been said that, just as a pledgee or mortgagee has a right to hold the property in his hands until the debt due him is paid, so a surviving partner may hold partnership property until the debts of the firm are paid, whether such debts run to general firm creditors or to himself, and that the statute of limitations will not run against him, so as to render his hold upon the assets the less valid until such debts are paid.<sup>63</sup> The surviving copartner has the closing up of the partnership affairs, the reduction of its property into cash for the payment of the firm debts, and the actual payment of these debts,<sup>64</sup> without the executor having the right to interfere, except, of course, that he has access to the courts to compel this surviving partner to proceed to close up the business,<sup>65</sup> and to have his proceedings scrutinized to the

No.) §§ 77, 138, 141, 153; *Cent. Dig.* §§ 125, 145, 214-221, 275, 306; "Tenancy in Common," *Dec. Dig. (Key No.)* §§ 27, 35; *Cent. Dig.* §§ 27, 72.

<sup>62</sup> *Thursby v. Lidgerwood*, 69 N. Y. 198. See "Partnership," *Dec. Dig. (Key No.)* § 245; *Cent. Dig.* § 515.

<sup>63</sup> *Clay v. Freeman*, 118 U. S. 97, 6 Sup. Ct. 964, 30 L. Ed. 104. See "Partnership," *Dec. Dig. (Key No.)* §§ 76, 77, 246; *Cent. Dig.* §§ 116, 124, 125, 145, 522.

<sup>64</sup> *BUCKLEY v. BARBER*, 6 Exch. 164. See "Partnership," *Dec. Dig. (Key No.)* §§ 243-255; *Cent. Dig.* §§ 509-561.

<sup>65</sup> *Clay v. Freeman*, 118 U. S. 97, 6 Sup. Ct. 964, 30 L. Ed. 104. See "Partnership," *Dec. Dig. (Key No.)* § 246; *Cent. Dig.* § 522.

end that the estate be not made to suffer through any fraud of his.<sup>66</sup> And it is necessary at times for the executor thus to have the survivor compelled to proceed to close up the firm's affairs; for the standing idly by of those interested in the estate of the deceased partner, while the survivor continues the business, using the property of the partnership as before, must result in the subordination of the rights of the estate in the assets to those of subsequent creditors of the firm.<sup>67</sup> But this is the extent of the right to interfere, and, while the whole property does not become part of the permanent estate of this survivor, the latter can, by his disposition of it in aid of such settlement, bind the executor and the heirs and devisees of the deceased partner, so that they may be compelled subsequently, in a court of equity, to give effect to such disposition so far as they may be able to do so.<sup>68</sup> This is all that the survivorship really amounts to in connection with partnership property; for, after paying all the firm debts, the survivor's right to the corpus of that property ends. He has his share, and the executor or other representative of the deceased has the share of the latter after the settlement of the firm's affairs is done. Thus the tenancy can be no more properly called "joint" than "in common." It has, it is true, been said that this holding by the survivor is not that of a trustee;<sup>69</sup> but it has never been claimed that it is beneficial to himself, although in *Holbrook v. Lackey*<sup>70</sup> a firm debtor, sued by such survivor, was allowed to set off the latter's private indebtedness. However, in a situation like the last the sur-

<sup>66</sup> *KNOX v. GYE*, L. R. 5 H. L. 656. See "*Partnership*," *Dec. Dig. (Key No.)* §§ 243-255; *Cent. Dig.* §§ 509-561.

<sup>67</sup> *Hoyt v. Sprague*, 103 U. S. 613, 26 L. Ed. 585. See "*Partnership*," *Dec. Dig. (Key No.)* §§ 243-255; *Cent. Dig.* §§ 509-561.

<sup>68</sup> *SHANKS v. KLEIN*, 104 U. S. 18, 26 L. Ed. 635, *Gilmore, Cas. Partnership*, 269. See "*Partnership*," *Dec. Dig. (Key No.)* §§ 243-255; *Cent. Dig.* §§ 509-561.

<sup>69</sup> *KNOX v. GYE*, L. R. 5 H. L. 656. But see *Jones v. Dexter*, 130 Mass. 380, 39 Am. Rep. 459. See "*Partnership*," *Dec. Dig. (Key No.)* §§ 243-255; *Cent. Dig.* §§ 509-561.

<sup>70</sup> *HOLBROOK v. LACKEY*, 13 Metc. (Mass.) 182, 46 Am. Dec. 728. See "*Set-Off and Counterclaim*," *Dec. Dig. (Key No.)* § 45; *Cent. Dig.* § 97.

vivor would be required to account for this in his settlement, so that here is no attempt to give to the holding a beneficial character. Pollock describes partners, with reference to their title generally to partnership property, as "owners in common or joint owners without benefit of survivorship,"<sup>71</sup> as if it is not necessary to be specific in the matter at all; and it has elsewhere been said that, although it is essential to a partnership that there be a community of interest in the substance of it, "this community of interest must not be that of mere joint tenants or tenants in common."<sup>72</sup> The title of partners to firm property can be said merely to bear an analogy to these two species of tenancy in respect of different features of each of them. For partnership property, as we have seen, is (theoretically, at least) always of a personal nature, which the significance of the old feudal tenancies does not properly touch. Besides this, the fact being that one partner can sell all the firm assets, and that, too, in the lifetime of his copartner, it is plain that the law of neither tenancy controls either the relation or its property.<sup>73</sup>

*Share a Right to Money*

What is meant by the "share" of a partner is his proportion of the partnership assets after they have been all realized and converted into money, and all the debts and liabilities have been paid and discharged.<sup>74</sup> When a partner-

<sup>71</sup> Pol. Partn. c. 6, art. 27.

<sup>72</sup> DONNELL v. HARSHE, 67 Mo. 170, Gilmore, Cas. Partnership, 63. See "Partnership," Dec. Dig. (Key No.) § 3; Cent. Dig. § 13.

<sup>73</sup> "The legal title of real estate, if in the name of more than one partner, is always held by them as tenants in common; but, in equity, it may be partnership property." Bates, Partn. § 280.

<sup>74</sup> "The interest of a member of such a firm in the assets of it is the share to which he is entitled by the terms of the copartnership in the surplus of those assets remaining after all partnership debts are fully paid. It appears in this case that the firm was insolvent; that its debts much exceeded its assets; that there never could arise a surplus. So the interest of Stockbridge, as an individual, in this property, was nothing; and so the plaintiff got nothing by his purchase." STAATS v. BRISTOW, 73 N. Y. 264, 267, Gilmore, Cas. Partnership, 211. As to the nature of a partner's interest, see, also, Fourth Nat. Bank v. New Orleans & C. R. Co., 11 Wall. 624, 20 L. Ed. 82; Filley v. Phelps, 18 Conn. 294; SINDELARE v. WALKER,

ship is dissolved or terminated, any one of the partners is entitled to have the whole assets sold and the proceeds applied to the payment of partnership debts, and whatever then remains is to be divided among the partners in proportion to their several shares. No partner is entitled to a partition of the property in kind, whether the property is real or personal.<sup>18</sup>

### TRANSFER OF PARTNERSHIP PROPERTY—BY ACT OF THE PARTNERSHIP

56. Partnership property may be transferred by the act of all the partners or by the act of one authorized to represent all. The method and validity of such transfers are governed by the general laws applicable to all transfers of property held jointly.
57. All transfers of individual property and of partnership property are subject to being set aside, if found to be made with intent to hinder, delay, or defraud the creditors of the grantor.

Property owned by partners may be transferred in all the ways in which any other property held in common may be transferred, and subject to the same general laws appli-

137 Ill. 43, 27 N. E. 59, 31 Am. St. Rep. 353; *Trowbridge v. Cross*, 117 Ill. 109, 7 N. E. 347; *Douglas v. Winslow*, 20 Me. 89; *MENAGH v. WHITWELL*, 52 N. Y. 146, 11 Am. Rep. 683, *Gillmore, Cas. Partnership*, 251; *Hiscock v. Phelps*, 49 N. Y. 97. A partner's share is a right to money. *Lindl. Partn.* p. 339. A partner can compel a sale and a division of the proceeds, but not a partition of the partnership property. *WILD v. MILNE*, 26 Beav. 504. A partner's interest is a chose in action. *Ames, Cas. Partn.* 163. A partner's claim for an accounting after a dissolution must be brought within the period prescribed by the statute of limitations, or it will be barred. *KNOX v. GYE*, L. R. 5 H. L. 656, followed in *Taylor v. Taylor*, 23 Law T. 189. See, also, *Strange v. Graham*, 56 Ala. 614; *Pierce v. McClellan*, 93 Ill. 245; *Coudrey v. Gilliam*, 60 Mo. 86; *Massey v. Tingle*, 29 Mo. 437; *Manchester v. Mathewson*, 3 R. I. 237. See "*Partnership*," *Dcc. Dig. (Key No.)* §§ 76, 220; *Cent. Dig.* §§ 124, 459½.

<sup>18</sup> *WILD v. MILNE*, 26 Beav. 504; *KRUSCHKE v. STEFAN*, 83 Wis. 373, 53 N. W. 679; *PENNYBACKER v. LEARY*, 65 Iowa, 220,

cable to all such transfers. As the law does not recognize the firm as an entity, it is necessary for purposes of alienation of firm property to follow the general rules of conveyancing. Firm property, as has been pointed out, is the property of the members of the firm, held and used for purposes of the common business. To alienate it, all the partners must join, or one of them must act with authority for all. The transfer may be made for any purpose, although when one partner alone acts his authority will usually be limited to transfers within the scope of the partnership business and for firm purposes. Likewise the transfer may be made to strangers, or to a member of the partnership. By the latter conveyance what is joint property of all the partners may become the joint property of less than all,<sup>76</sup> or the separate property of a single partner.<sup>77</sup>

*Same—Conveyances in Fraud of Creditors*

All transfers of property, however, whether belonging to individuals severally, jointly, or as partners, are subject to being set aside on the ground that they were made with intent to hinder, delay, or defraud the creditors of the transferor. All transfers of partnership property are subject to the same attack. The firm creditors have no lien upon the firm property as such, and have no right to object to the use of the property by the firm in any way it sees fit, so long as the use does not make the partners insolvent, and was not done to delay or defraud creditors.<sup>78</sup> No person can defraud his creditors by disposing of his property with the intent of defeating them in their attempts to collect

21 N. W. 575, Gilmore, Cas. Partnership, 214; Mendenhall v. Benbow, 84 N. C. 646. In *MOLINEAUX v. RAYNOLDS et al.*, 54 N. J. Eq. 559, 35 Atl. 536, Gilmore, Cas. Partnership, 215, the court decreed a partition; it appearing that there were abundant assets left to meet all possible firm debts. See "*Partnership*," Dec. Dig. (Key No.) §§ 297-306; Cent. Dig. §§ 679-709.

<sup>76</sup> *BOLTON v. FULLER*, 1 Bos. & P. 539. See "*Partnership*," Dec. Dig. (Key No.) §§ 68, 93, 94; Cent. Dig. §§ 112, 113, 140, 141.

<sup>77</sup> Ex parte *RUFFIN*, 6 Ves. 119, Gilmore, Cas. Partnership, 217. See "*Partnership*," Dec. Dig. (Key No.) §§ 93, 94; Cent. Dig. §§ 140, 141.

<sup>78</sup> *Blake v. Sargent* (D. C.) 152 Fed. 263. See "*Partnership*," Dec. Dig. (Key No.) § 183; Cent. Dig. §§ 319-336, 348.

their debts. The same rule applies to a partnership. The creditors of a partnership have a claim against the assets of the partnership which prevents the partnership from disposing of them with a fraudulent intent. "In this respect it resembles the claim which the general creditors of an individual have upon his property. It is neither an estate nor a lien. It is, ordinarily, but a right by lawful procedure to acquire a lien during the ownership of the debtor; yet, under certain circumstances, that lien may be acquired after the debtor's ownership has ended. This results from the provisions of the ancient statute for the prevention of fraud and perjuries, by force of which, when a person has alienated his property with intent to hinder, delay, or defraud his creditors, the rights of those creditors remain as if no alienation had taken place, except against the claims of bona fide purchasers, for good consideration, without notice. Equity applies this statute to a partnership, its property and creditors, just as it would in case of an individual, and therefore, while generally it is true that a partnership may defeat the equity of its creditors by the alienation of its property and consequent extinguishment of the rights of its partners *inter sese*, yet, if the alienation be effected with intent to hinder, delay, or defraud the firm creditors by defeating their equity, the claims of creditors will be unimpaired, and the property will be treated as partnership assets, unless it shall have passed into the hands of those whom the statute protects."<sup>70</sup>

#### *Purpose of Transfer of Firm Property*

Assuming that the transfers are made in proper form by all the partners, or by one acting under authority for all, the validity thereof will be affected essentially by their purpose. Before considering the purpose of the transfers, it will be necessary to discuss the purpose for which firm assets are held and the origin and nature of the firm creditors' rights in firm assets. All questions relating to the power of each partner to transfer firm property are discussed in

<sup>70</sup> *ARNOLD v. HAGERMAN*, 45 N. J. Eq. 186, 17 Atl. 93, 14 Am. St. Rep. 712, Gilmore, *Cas. Partnership*, 223. See "*Partnership*," *Deco. Dig. (Key No.)* § 183; *Cent. Dig.* §§ 319-336, 348.

the chapter on Powers of Partners. It is assumed here that, so far as authority of an agent partner making the conveyance is concerned, the transfer is valid.

### **SAME—FIRM CREDITORS' RIGHTS IN FIRM ASSETS—PARTNER'S LIEN**

58. When persons enter into a partnership relation, there is implied as a mutual agreement that all partnership property shall be devoted first to the payment of partnership debts. A court of equity, if it has acquired jurisdiction of the settlement of the affairs of a partnership, will recognize and enforce their agreement. The effect of such enforcement will be the payment of the firm creditors out of the firm assets before the separate creditors of each partner. Firm creditors are said, therefore, to have a priority in equity in a distribution of firm assets. Such priority, however, is based, not upon any right of their own, but upon the right of the partners against one another, and is called a "derivative right."

The firm creditors' priority is also put upon other grounds: (a) That they extended credit on the faith of the firm assets and should have first claim upon them; (b) that the firm is an entity having its own creditors and property.

While it should be recognized that the priority of firm creditors in firm assets is variously explained, it would seem the explanation given in the foregoing black letter is the one most frequently found in the language of the decisions.

In the distribution of assets of the partnership in a court of equity, the firm creditors are given a preference out of the firm assets over the individual creditors. This preference is said to be derived from the right which each partner has, in equity, to have the firm assets applied to firm debts, rather than to the individual debts of the respective

partners. The origin of this "equity" of the partners, as it is called, is said to rest in "an implied contract that the assets shall not be used for private purposes,"<sup>80</sup> or, in other words, "upon the presumed intention of the partners themselves."<sup>81</sup> Out of the equity of the partners themselves grows the equity of the firm creditors. "The right of each partner extends only to a share of what may remain after payment of the debts of the firm and the settlement of its accounts. Growing out of this right, or rather included in it, is the right to have the partnership property applied to the payment of the partnership debts in preference to those of any individual partner. This is an equity the partners have as between themselves, and in certain circumstances it inures to the benefit of the creditors of the firm. The latter are said to have a privilege or preference, sometimes loosely denominated a 'lien,' to have the debts due to them paid out of the assets of a firm in course of liquidation, to the exclusion of the creditors of its several members. Their equity, however, is a derivative one. It is not held or enforceable in their own right. It is practically a subrogation to the equity of the individual partner, to be made effective only through him. Hence, if he is not in a position to enforce it, the creditors of the firm cannot be. But so long as the equity of the partner remains in him, so long as he retains an interest in the firm assets as a partner, a court of equity will allow the creditors of the firm to avail themselves of his equity, and enforce, through it, the application of those assets primarily to payment of the debts due them, whenever the property comes under its administration. It is indispensable, however, to such relief, when the cred-

<sup>80</sup> *DARBY v. GILLIGAN*, 33 W. Va. 246, 10 S. E. 400, 6 L. R. A. 740, Gilmore, Cas. Partnership, 221. In this case it is also suggested that the priority is based upon the doctrine of suretyship, since such partner is liable in solido for the firm debts, and is therefore, inter se, virtually a surety for the copartners for their proportions, and is entitled to have the firm assets applied so as to relieve him from paying more than his share. See "*Partnership*," *Dec. Dig. (Key No.)* §§ 176-183; *Cent. Dig.* §§ 308-336.

<sup>81</sup> *ARNOLD v. HAGERMAN*, 45 N. J. Eq. 186, 17 Atl. 93, 14 Am. St. Rep. 712, Gilmore, Cas. Partnership, 223. See "*Partnership*," *Dec. Dig. (Key No.)* §§ 176-183; *Cent. Dig.* §§ 308-336.

itors are, as in the present case, simple contract creditors, that the partnership property should be within the control of the court, and in the course of administration, brought there by the bankruptcy of the firm, or by an assignment, or by the creation of a trust in some mode. This is because neither the partners nor the joint creditors have any specific lien, nor is there any trust that can be enforced until the property has passed in custodia legis. Other property can be followed only after a judgment at law has been obtained and an execution has proved fruitless."<sup>82</sup>

It should be noticed that the foregoing statements deal with the situation where the assets of the partnership are in the hands of the court for distribution. As will be more fully discussed in a later chapter,<sup>83</sup> most courts, with more or less slight variations, follow the general rule announced. How far this equitable rule of distribution should control the partners, while the partnership is a going concern and they are in full control of the firm assets, is a question of considerable perplexity. It remains, therefore, to consider certain transfers made by the partners while the partnership is a going concern: First, transfers whereby the firm property becomes the separate property of the partners, or the property of fewer than all the original number of partners, or becomes the property of a single partner; second, transfers whereby the firm property is applied to the payment of the debts of a single partner or of the individual debts of all the several partners.

#### **SAME—CHANGE OF FIRM PROPERTY INTO SEPARATE PROPERTY**

**59. Partnership property may by agreement of all the partners become the separate property of such partners, or the property of fewer than all the original partners, or the property of a single partner.**

<sup>82</sup> Strong, J., in *CASE v. BEAUREGARD*, 99 U. S. 119, 25 L. Ed. 370, Gilmore, Cas. Partnerships, 226. See "*Partnership*," *Dec. Dig. (Key No.)* §§ 176-183; *Cent. Dig.* §§ 308-336.

<sup>83</sup> Chapter VII, p. 404, Rights of Creditors.

**PROVIDED, HOWEVER,** that such change of ownership is not made with intent to hinder, delay, or defraud firm creditors. It is held by a majority of the courts that a fraudulent intent must be actually shown; the transfer, being upon a consideration, is not impeached by the fact of insolvency alone. It is held by other courts that, if the partnership and its members are insolvent, the change is fraudulent; the conveyance being voluntary, the fact of insolvency is proof of bad faith.

#### *In General*

A brief statement of the law governing fraudulent conveyances seems desirable for a clear understanding of the principles here involved. Having laid down the general rule governing fraudulent conveyances, they will then be discussed in connection with partnership cases.

Persons in the partnership relation enjoy the same rights and are subject to the same restrictions as the owners of property generally with respect to its alienation. The absolute ownership of property includes the right to dispose of it, by gift, sale, or otherwise, as one sees fit, subject, always, however, to one restriction, imposed by the common law and by statutes declaratory thereof, viz., that such alienation shall not be done with intent to hinder, delay, or defraud the grantor's creditors. One may give away or sell his property. If a person is solvent, he may make a voluntary gift, if he acts in good faith; i. e., without intent to hinder, delay, or defraud his creditors. As the donor is solvent, however, and has other property with which to pay his creditors, it will rarely, if ever, occur that a voluntary gift by such a person will be fraudulent. If, however, a person is insolvent, a gift of his property will inevitably hinder and defraud his creditors, and will always, therefore, be fraudulent. The insolvency of the donor, in dealing with voluntary conveyances (that is, conveyances without consideration), is commonly said to prove bad faith.

One may sell his property, and if he does so for a consideration and in good faith the transfer is valid. The law requires both consideration and good faith. If the vendor

is solvent and received a good consideration, the transaction can scarcely be impeached, because the sale, being for a good consideration, will seldom hinder and delay the creditors, and will therefore rarely be fraudulent. The nature and adequacy of the consideration, however, is always material on the issue of good faith. Likewise, if an insolvent person should sell his property for a good consideration, the transfer would be valid if made in good faith. Here, also, the presence or absence of good faith will depend to considerable extent upon the nature and adequacy of the consideration. If the consideration is adequate, it will not be likely that the alienation will hinder and delay creditors, and will not be fraudulent. There is necessarily an intimate connection between consideration and good faith, so intimate that it is commonly said that good faith requires consideration. But good faith may be disproved, even though there be consideration, and inadequacy of consideration does not always prove bad faith. It should be noticed here that a conveyance purporting to be upon a consideration may be attacked on the ground that the consideration is worthless, and hence that the conveyance is voluntary. If thus established to be voluntary, the insolvency of the grantor will of itself be sufficient to prove bad faith.

Good faith, when dealing with voluntary conveyances, means the state of mind of the donor; for the donee, having paid no value, could not retain the property against the creditors of the fraudulent donor, and therefore the donee's state of mind is immaterial. Good faith, on the other hand, when dealing with conveyances on consideration, means the state of mind of the seller and purchaser; that is, the law protects the innocent purchaser for value, and in order to impeach a transfer it must appear that the vendor and vendee were both in bad faith.\*\*

*Transfer of Firm Property for Promise to Pay Firm Debts—Valid*

While a partnership is a solvent and going concern, there can be no doubt that its members may by agreement make such disposition of the firm property as they see fit, so

\*\* Bump on Fraudulent Conveyances (4th Ed.) cc. VIII, IX, XI.

long as they act in good faith.\*\* The usual situation that arises in this connection is one in which the firm property is transferred by all the partners to one or more of their number, who agree in consideration of such transfer to assume and pay the firm debts. As between the partners such a transaction results in changing the firm property into separate property. Its effect upon the rights of firm creditors, however, must be determined by the law of fraud-

\*\* This was decided in *BOLTON v. PULLER*, 1 Bos. & P. 530, where two banking firms carried on business, one in Liverpool and one in London. All the members of the latter firm were partners in the former, which, however, included others besides the members of the London firm. In the course of business between the two firms, certain bills of exchange were transferred from the Liverpool firm to the London firm. On both firms becoming bankrupt, it was held that the bills were the property of the London firm; the court saying: "There can be no doubt that as between themselves a partnership may have transactions with an individual partner, or with two or more of the partners having their separate estate, engaged in some joint concern, in which the general partnership is not interested, and that they may by their acts convert the joint property of the general partnership into the separate property of an individual partner. \* \* \* And their transactions in this respect will, generally speaking, bind third persons, and third persons may take advantage of them in the same manner as if the partnership were transacting business with strangers."

*CASE v. BEAUREGARD*, 99 U. S. 119, 25 L. Ed. 370, Gilmore, Cas. Partnership, 226; *Levy v. Williams*, 79 Ala. 171; *Conroy v. Woods*, 13 Cal. 626, 73 Am. Dec. 605; *Allen v. Center Valley Co.*, 21 Conn. 136, 54 Am. Dec. 333; *Schleicher v. Walker*, 28 Fla. 680, 10 South. 33; *Upson v. Arnold*, 19 Ga. 190, 63 Am. Dec. 302; *Singer, Nimick & Co. v. Carpenter*, 125 Ill. 117, 17 N. E. 761; *Dunham v. Hanna*, 18 Ind. 270; *City of Maquoketa v. Willey*, 35 Iowa, 323; *Kelley v. Flory*, 84 Iowa, 671, 51 N. W. 181; *Woodmansie v. Holcomb*, 34 Kan. 35, 7 Pac. 603; *Wilson v. Soper*, 13 B. Mon. (Ky.) 411, 56 Am. Dec. 573; *Jones v. Lusk*, 2 Metc. (Ky.) 361; *Coakley v. Weil*, 47 Md. 277; *Robb v. Mudge*, 14 Gray (Mass.) 534; *Schmidlapp v. Currie*, 55 Miss. 597, 30 Am. Rep. 530; *Sexton v. Anderson*, 95 Mo. 373, 8 S. W. 564; *Stanton v. Westover*, 101 N. Y. 265, 4 N. E. 529; *MENAGH v. WHITWELL*, 52 N. Y. 146, 11 Am. Rep. 683, Gilmore, Cas. Partnership, 251; *Mortley v. Flanagan*, 38 Ohio St. 401; *Baker's Appeal*, 21 Pa. 76, 59 Am. Dec. 752; *Waterman v. Hunt*, 2 R. I. 298; *Croone v. Blvens*, 2 Head (Tenn.) 339; *White v. Parish*, 20 Tex. 688, 73 Am. Dec. 204; *Rice v. Barnard*, 20 Vt. 479, 50 Am. Dec. 54. See "*Partnership*," *Dec. Dig. (Key No.)* §§ 69, 76, 77, 176-183; *Cent. Dig.* §§ 112, 113, 116, 124, 125, 145, 308-336.

ulent conveyances. The transfer now discussed purports to be one upon a consideration, and therefore should not in the first instance be dealt with as a voluntary conveyance. The consideration for the transfer from partnership property into separate property was the promise by the grantees to assume and pay the firm debts. If such promise be regarded as a consideration, and there would seem to be no reason why it should not be so regarded, even though the promisee is or soon becomes insolvent and never performs his promise, then the conveyance should be valid, unless it was made in bad faith; that is, with intent to hinder, delay, and defraud the firm creditors. Whether the firm be solvent or insolvent is not the determining factor, for an insolvent person may sell his property, if he acts in good faith. Mere knowledge of insolvency will not, in conveyances upon consideration, prove bad faith.<sup>86</sup> The validity of such conveyance being one upon a consideration, will depend upon the good faith of the parties, and, in the absence of proof of actual bad faith, the weight of authority seems to sustain such a transaction, whether the firm be solvent or insolvent.<sup>87</sup> If the transaction be valid, then the priority of the firm creditors to payment is lost; for such priority, being derived through the rights of the partners, disappears when the partners relinquish that right by agreeing to change firm into several property.<sup>88</sup>

<sup>86</sup> *Ruhl v. Phillips*, 48 N. Y. 125, 8 Am. Rep. 522. See "*Partnership*," *Dec. Dig. (Key No.)* §§ 176-183; *Cent. Dig.* §§ 308-336.

<sup>87</sup> See cases cited in note 85, above. *Myers v. Tyson*, 2 Kan. App. 464, 43 Pac. 91; *Hulskamp v. Moline Wagon Co.*, 121 U. S. 310, 7 Sup. Ct. 899, 30 L. Ed. 971; *Reynolds v. Johnson*, 54 Ark. 449, 16 S. W. 124; *Sickman v. Abernathy*, 14 Colo. 174, 23 Pac. 447; *Allen v. Center Valley Co.*, 21 Conn. 130, 54 Am. Dec. 333; *Ellison v. Lucas*, 87 Ga. 223, 13 S. E. 445, 27 Am. St. Rep. 242; *Hapgood v. Cornwell*, 48 Ill. 64, 95 Am. Dec. 516; *Hanford v. Prouty*, 133 Ill. 339, 24 N. E. 565; *Purple v. Farrington*, 119 Ind. 164, 21 N. E. 543, 4 L. R. A. 535; *Richards v. Manson*, 101 Mass. 482; *Dimon v. Hazard*, 32 N. Y. 65; *Gallagher's Appeal*, 114 Pa. 353, 7 Atl. 237, 60 Am. Rep. 350; *Carver Gin & Machine Co. v. Bannon*, 85 Tenn. 712, 4 S. W. 831, 4 Am. St. Rep. 803; *Sigler v. Knox County Bank*, 8 Ohio St. 511. See "*Partnership*," *Dec. Dig. (Key No.)* §§ 176-183; *Cent. Dig.* §§ 308-336.

<sup>88</sup> "If, before the interposition of the court is asked, the property

*Same—Contrary View*

It should be recognized that there are many cases which hold that a transaction of the kind above described is invalid.<sup>89</sup> The conveyance, according to these cases, is impeached on the ground that it is voluntary. This is established by holding that what purports to be the consideration for it is worthless. It is worthless because, the promisee being insolvent, or becoming so within a short time without having performed his promise to pay the firm debts, the retiring partners received nothing for relinquishing their interest in the firm property. Being a voluntary conveyance, and the grantor being insolvent, this latter fact conclusively shows that its effect is to hinder and defraud

has ceased to belong to the partnership, if by a bona fide transfer it has become the several property either of one partner or of a third person, the equities of the partners are extinguished, and consequently the derivative equities of the creditors are at an end. It is, therefore, always essential to any preferential right of the creditors that there shall be property owned by the partnership when the claim for preference is sought to be enforced." Strong, J., in *CASE v. BEAUREGARD*, 99 U. S. 119, 25 L. Ed. 370, Gilmore, Cas. Partnership, 226.

In *HOWE v. LAWRENCE*, 9 Cush. (Mass.) 553, 57 Am. Dec. 68, Henry Shaw and William Gardner, partners under the name of Shaw & Gardner, becoming dissatisfied, dissolved the partnership; Gardner buying the firm property and agreeing to pay the firm debts. The partnership and each partner was at the time insolvent, though there was no proof that either knew it. It was held, in the distribution of the assets of Gardner in insolvency, that the former property of the firm had become his separate property, and the firm creditors were not entitled to priority in its distribution. *Mansur-Tebbetts Implement Co. v. Ritchie*, 159 Mo. 213, 60 S. W. 87; *Bedford v. McDonald*, 102 Tenn. 358, 52 S. W. 157. See "*Partnership*," *Dec. Dig. (Key No.) §§ 176-183; Cent. Dig. §§ 308-336*.

<sup>89</sup> *DARBY v. GILLIGAN*, 33 W. Va. 246, 10 S. E. 400, 6 L. R. A. 740, Gilmore, Cas. Partnership, 221; *ARNOLD v. HAGERMAN*, 45 N. J. Eq. 186, 17 Atl. 93, 14 Am. St. Rep. 712, Gilmore, Cas. Partnership, 223; *JACKSON BANK v. DURFEE*, 72 Miss. 971, 18 South. 456, 31 L. R. A. 470, 48 Am. St. Rep. 596; *BANNISTER v. MILLER*, 54 N. J. Eq. 121, 32 Atl. 1066; *Miller v. Bannister*, 54 N. J. Eq. 701, 37 Atl. 1117; *Ex parte MAYOU*, 4 De G., J. & S. 664; *Marsh v. Bennett*, Fed. Cas. No. 9,110; *In re Cook*, Fed. Cas. No. 3,150; *Conroy v. Woods*, 13 Cal. 626, 73 Am. Dec. 605. See "*Partnership*," *Dec. Dig. (Key No.) §§ 176-183; Cent. Dig. §§ 308-336*.

the creditors, and hence it is fraudulent. Thus in *Ex parte Mayou*,<sup>90</sup> one of two partners made an assignment to the other of the firm property in consideration that the other assumed the firm debts. Both were in fact insolvent at the time, as was the partnership. It was held that such an assignment was fraudulent as against the firm creditors. Lord Chancellor Westbury said: "Taking, then, in the first place, the principle of law which is embodied in the statute of 13 Eliz. c. 5, and applying that to the transaction, I think that it was not competent for the one to make or for the other to accept an assignment of that description, both of them being insolvent at the time, \* \* \* because it had for its immediate and necessary object and consequence the alteration of the property in such a manner as would defect or delay the joint creditors. \* \* \* Having regard to the principle that a voluntary assignment is, in this sense, a fraudulent assignment, if I regard the transaction as entered into by one partner alone, I cannot look at it as a conveyance for good or valuable consideration, seeing that the covenant by the assignee of the partners was a covenant entered into by a man in a state of insolvency, and in this sense, being voluntary, it would be fraudulent within the meaning which has been applied to this term."<sup>91</sup>

<sup>90</sup> *Ex parte MAYOU*, 4 De G., J. & S. 864. See "*Partnership*," *Dec. Dig.* (Key No.) §§ 176-183; *Cent. Dig.* §§ 308-336.

<sup>91</sup> In *ARNOLD v. HAGERMAN*, 45 N. J. Eq. 186, 17 Atl. 93, 14 Am. St. Rep. 712, Gilmore, Cas. Partnership, 223, one Farr, being in the lumber business, formed a copartnership in the business with Hagerman and Fielder, under the name J. C. Farr & Co. Hagerman and Fielder gave their notes to Farr to pay for certain property already in the business, which became firm property. The firm becoming embarrassed, an assignment was made to Farr; he returning the notes, and agreeing to pay the firm indebtedness. Farr made an assignment for the benefit of creditors, and upon an attempt being made to set aside the assignment to Farr the court held it to be fraudulent, saying: "At the time of the transfer by Hagerman and Fielder to Farr, the insolvency of each of these persons and of the firm of J. C. Farr & Co. was patent to them all, and, indeed, was the moving cause of the transfer. They all knew that, in the condition of affairs then existing, none of them could meet maturing obligations, and it was in the hope of facilitating an extension or

*Same—Some Partners Remaining Solvent*

In the foregoing discussion it has been assumed that all the partners are insolvent. If any of the partners who thus join in changing the firm property into the several property of one of the partners remain solvent, the transaction, even though established to be voluntary in the manner above described, is not necessarily fraudulent. It is to be treated, then, as a gratuitous transfer by any solvent person, and such transfers, as has been seen, can rarely be impeached.

*Same—All the Partners Still Remain Liable*

Notwithstanding that the firm assets may be thus converted into the separate property of the partners, the contract liability of all the original members of the firm still continues, and firm creditors may pursue their remedies at law and seize the property upon execution in the hands of the partner to whom it has been conveyed. But they have lost their priority with respect to such property, and, unless they have perfected their liens at law, they will, upon a distribution in equity of the assets of the separate partners, be postponed to the separate creditors.<sup>92</sup>

compromise with creditors that the transfer was made. The transfer embraced all the partnership property. If valid in all respects, it appropriated the shares of Hagerman and Fielder to the payment of the debts of Farr, for which those shares were previously not liable, and left Hagerman and Fielder without any property whatever, as we gather from the testimony, to pay their debts. Inevitably, therefore, by defeating the equity of the partnership creditors, it would hinder them in the collection of their just claims. It is a reasonable inference that these partners intended this manifest effect of their act, and consequently the assignment by Hagerman and Fielder to Farr must, according to the terms of the statute, be deemed void as against the partnership creditors. Not only upon the ground of a common intent to hinder partnership creditors, thus inferred from the knowledge which all parties must have had of the necessary consequences of the transfer itself, but also upon the ground that the transfer was made without valuable consideration—was voluntary in the legal sense—it should be decreed invalid against the partnership creditors, all of whose debts were then in existence." See "*Partnership*," *Dec. Dig. (Key No.)* §§ 176-183; *Cent. Dig.* §§ 308-336.

<sup>92</sup> See chapter VII, p. 404, on Rights of Creditors.

*Same—Executory Agreements—Reservation of Lien*

If the agreement to change the firm property into several property remains executory, or the legal title is not to pass until certain acts are done, the rights of firm creditors will not be destroyed.<sup>93</sup> So, also, if the conveyance is made with a reservation by the partners of the right to have the firm debts paid, the priorities of firm creditors will be preserved. As, for example, where the grantors have the right to defeat the conveyance if the firm debts are not paid.<sup>94</sup> If the legal title, however, has actually passed, and has by subsequent conveyance come into the hands of a purchaser in good faith for value, it would seem that a reservation of lien would be unavailing to save the firm creditors' priorities.

**SAME—USE OF FIRM PROPERTY TO PAY SEPARATE DEBTS OF PARTNERS**

60. A transfer by an insolvent partnership of firm property to pay the individual indebtedness of a partner, being voluntary, is fraudulent as to firm creditors.
61. A transfer by an insolvent partnership of firm property to pay the individual indebtedness of all the members of the partnership is held by some courts to be valid, unless there was actual intent to defraud firm creditors. By other courts it is held that such a transfer, being voluntary, is necessarily fraudulent.

<sup>93</sup> In re KEMPTNER, L. R. 8 Eq. 286. See "*Partnership*," Dec. Dig. (Key No.) §§ 176-183; Cent. Dig. §§ 308-336.

<sup>94</sup> THAYER v. HUMPHREY, 91 Wis. 276, 64 N. W. 1007, 30 L. R. A. 549, 51 Am. St. Rep. 887; Gilmore, Cas. Partnership, 546; Bulger v. Rosa, 119 N. Y. 459, 24 N. E. 853.

It has also been held that the continuing partner takes the assets in trust for the firm creditors, and will be required to pay the firm debts before using them for other purposes. Bowman v. Spalding (Ky.) 2 S. W. 911; Shackelford's Adm'r v. Shackelford, 32 Grat. (Va.) 481. See "*Partnership*," Dec. Dig. (Key No.) §§ 176-183; Cent. Dig. §§ 308-336.

*Transferring Partnership Property to Pay a Separate Debt of One Partner*

Firm property is often, by conveyance of all the partners, or by one acting under authority from all, used to pay or secure the debt of a single partner. This may be done by a conveyance or a mortgage. The effect of such a transaction is to put the firm property out of the reach of the firm creditors, or to incumber it to their prejudice. If the firm is solvent, or receives a good consideration, no objection can be made to it. If, however, the firm is insolvent, and no consideration is received, the law applicable to voluntary conveyances by insolvent persons applies, and the transaction is invalid.<sup>95</sup> In the case of *Menagh v. Whitwell*,<sup>96</sup> it was said with reference to a mortgage given by members of a firm: "The mortgages executed by John C. Smith and William B. Rubert appear to have been regarded by the learned referee as transferring an undivided four-fifths of the corpus of the partnership property therein described. He has found, as to the mortgage from Smith, that it was executed and delivered with the assent of the other members of the firm. This mortgage, if such be its true construction, having been given to secure the individ-

<sup>95</sup> *Keith v. Fink*, 47 Ill. 272; *Heineman v. Hart*, 55 Mich. 64, 20 N. W. 792; *Rothell v. Grimes*, 22 Neb. 526, 35 N. W. 392; *Ferson v. Monroe*, 21 N. H. 462; *BANNISTER v. MILLER*, 54 N. J. Eq. 121, 32 Atl. 1066; *Ransom v. Vandeventer*, 41 Barb. (N. Y.) 307; *Lester v. Pollock*, 3 Rob. (N. Y.) 691.

An assumption by a solvent firm of the debts of one of its members is valid, notwithstanding that when the undertaking is performed the firm is insolvent. *Nordlinger v. Anderson*, 123 N. Y. 544, 25 N. E. 992; *Teague v. Lindsey*, 106 Ala. 260, 17 South. 538; *Werner v. Iler*, 54 Neb. 576, 74 N. W. 833; *Bernheimer v. Rindskopf*, 116 N. Y. 423, 22 N. E. 1074, 15 Am. St. Rep. 414.

It has also been held that, if the debt of the single partner which is paid was incurred for the firm and the firm got the benefit of it, the firm property may be used to pay it. *Blackwell v. Rankin*, 7 N. J. Eq. 152; *Gwin v. Selby*, 5 Ohio St. 96; *Siegel v. Chidsey*, 28 Pa. 279, 70 Am. Dec. 124; *Coffin's Appeal*, 106 Pa. 280. See "*Partnership*," *Dec. Dig. (Key No.)* §§ 176-183; *Cent. Dig.* §§ 308-336.

<sup>96</sup> *MENAGH v. WHITWELL*, 52 N. Y. 146, 11 Am. Rep. 683, *Gilmore, Cas. Partnership*, 251. See "*Partnership*," *Dec. Dig. (Key No.)* §§ 220, 227; *Cent. Dig.* §§ 449, 473½.

ual debt of the partner, even if effectual as to the firm, by reason of the concurrence of all the partners giving it, would be a fraudulent misapplication of the partnership property, and void as to the creditors of the firm, under the principle of the cases of *Ransom v. Vandeventer*,<sup>97</sup> and *Wilson v. Robertson*,<sup>98</sup> unless the firm were solvent at the time the mortgage was given, and sufficient property would remain, over and above that devoted by that instrument to the payment of the individual debt, to pay the debts of the firm."<sup>99</sup>

*Transferring Partnership Property to Pay Separate Debts of All of the Partners*

If the partners are solvent, there would seem to be no doubt that they may by mutual agreement divide the firm assets and each apply his respective share to the payment of his individual debts. Whether such a transaction is valid as against firm creditors, if the partners are insolvent, is a question on which the authorities are in conflict. The conflict involves the same principles already discussed in connection with the transfer by all the members of a firm to a single partner, who agrees to pay the firm debts. The courts which uphold such transfers generally sustain the validity of the transaction now under consideration, and those which take the opposite view in that situation take the same view here.

*Same—Such Transfer is Valid*

The right of firm creditors to prior payment out of firm assets is a derivative right, and depends, as has been shown,

<sup>97</sup> 41 Barb. (N. Y.) 307. See "*Partnership*," Dec. Dig. (Key No.) § 183; Cent. Dig. §§ 328, 333.

<sup>98</sup> WILSON v. ROBERTSON, 21 N. Y. 587. See "*Partnership*," Dec. Dig. (Key No.) § 183; Cent. Dig. §§ 319-336; "*Assignments for Benefit of Creditors*," Cent. Dig. §§ 146, 147, 406.

<sup>99</sup> Goodbar v. Cary (D. C.) 16 Fed. 316; Caldwell v. Bloomington Mfg. Co., 17 Neb. 489, 23 N. W. 336; Bernheimer v. Rindskopf, 116 N. Y. 428, 22 N. E. 1074, 15 Am. St. Rep. 414; Knauth v. Bassett, 34 Barb. (N. Y.) 31; Nordlinger v. Anderson, 123 N. Y. 544, 25 N. E. 992; SAUNDERS v. REILLY, 105 N. Y. 12, 12 N. E. 170, 59 Am. Rep. 472; Ransom v. Vandeventer, 41 Barb. (N. Y.) 307; WILSON v. ROBERTSON, 21 N. Y. 587. See "*Partnership*," Dec. Dig. (Key No.) § 183; Cent. Dig. §§ 319-336, 348.

upon an implied agreement between the partners that the common assets shall not be divided until the debts incurred in the joint enterprise have been discharged. It is generally held that a relinquishment of this right by the partners against one another, if they are solvent and act in good faith, destroys the priority of firm creditors. Likewise it is held<sup>1</sup> that, even though the partners are insolvent, if they act in good faith and receive a consideration, the priority of the firm creditors is lost. The priority thus depending upon a right which is in the control of the partners themselves, they may, upon a good consideration and in good faith, relinquish such right. When, therefore, they decide to take the common assets and use them to pay their separate debts, the agreement amounts to a mutual relinquishment of reciprocal rights; each promise being the consideration for the other. There being, then, a consideration and good faith, the transaction cannot be impeached by the firm creditors. This is the holding by many courts.<sup>2</sup>

<sup>1</sup> See cases in note 85 above, and also in note 2 below.

<sup>2</sup> In *WIGGINS v. BLACKSHEAR*, 86 Tex. 685, 28 S. W. 939, an assignment was made of partnership property for the benefit of creditors; preference being given to individual creditors. The court said: "If they [the firm] had conveyed or mortgaged the entire property to pay or secure the debt of one of the partners, for which neither the firm nor the other partner was liable, then, on the plainest principles of right, it ought to be held that such a conveyance or mortgage was fraudulent as to firm creditors, and as to creditors of the member of the firm not bound for the debt, for, to the extent of his interest in the property, the conveyance would be voluntary. Such, however, is not the case we have before us. The value of the firm assets, exclusive of accounts and claims, which amounted to \$800, was shown to be \$1,310, and one-half of this was more than the individual indebtedness of either partner secured by the mortgage. As partnership creditors had no lien on firm property, no reason is perceived why each member might not lawfully permit the other to pay his individual debt out of his own share of the partnership property; and the same reasons which would make lawful such a payment would give validity to a mortgage given by both partners to secure debts of members of the firm."

Also, in *Re Edwards' Estate*, 122 Mo. 426, 25 S. W. 904, 29 L. R. A. 681, where the question was as to whether or not it was fraudulent for an insolvent firm to assume the individual debts of the partners by giving notes, the purpose of such notes being to put such creditors on an equality with firm creditors, the court, in holding

*Same—Such Transfer is Invalid*

Other courts, however, hold that such a transaction by insolvent partners is fraudulent as to firm creditors. The ground for this position is that the relinquishment of their reciprocal rights is voluntary and without consideration, and, the parties being insolvent, is therefore fraudulent. It is said that there is no consideration, because each partner has no specific interest in any tangible assets of the firm, but only a right to his share of the residue after the firm debts are paid; or it may be put on the ground that, the partners being insolvent, their mutual promises are worthless.<sup>3</sup>

such assumption not to be fraudulent, said: "The principle we think equally well settled by the more recent decisions of this court, as well as by the weight of judicial authority in other jurisdictions, that the assets of an insolvent firm, before dissolution, may, with the consent of all the partners, be applied to the satisfaction of all the individual debts of the members of the firm, when done in good faith. \* \* \* In the case at bar the firm notes were given in satisfaction of individual debts long prior to the dissolution of the partnership, and that transaction cannot be declared fraudulent at law on the ground simply that the firm was at the time insolvent or was made so by the act of making these notes."

The court cited the following Missouri cases to sustain its statement: *Reyburn v. Mitchell*, 106 Mo. 365, 16 S. W. 592, 27 Am. St. Rep. 350; *Sexton v. Anderson*, 95 Mo. 380, 8 S. W. 564 (referring also to the cases cited in each); and *Seger's Sons v. Thomas Bros.*, 107 Mo. 635, 18 S. W. 33, overruling *Phelps v. McNeely*, 66 Mo. 555, 27 Am. Rep. 378.

There was also cited the following from other jurisdictions: *Huiskamp v. Moline Wagon Co.*, 121 U. S. 310, 7 Sup. Ct. 899, 30 L. Ed. 971; *CASE v. BEAUREGARD*, 99 U. S. 119, 25 L. Ed. 370, Gilmore, Cas. Partnership, 226; *Coffin v. Day* (D. C.) 34 Fed. 687; *In re Kahley*, 2 Biss. 383, Fed. Cas. No. 7,593; *Purple v. Farrington*, 119 Ind. 164, 21 N. E. 543, 4 L. R. A. 535; *Warren v. Farmer*, 100 Ind. 593; *Trentman v. Swartzell*, 85 Ind. 443; *Schaeffer v. Fithian*, 17 Ind. 463; *George v. Wamsley*, 64 Iowa, 175, 20 N. W. 1; *Jones v. Lusk*, 2 Metc. (Ky.) 356; *Kirby v. Schoonmaker*, 3 Barb. Ch. (N. Y.) 46, 49 Am. Dec. 160; *Kennedy v. National Union Bank of Watertown*, 23 Hun (N. Y.) 494; *Pepper v. Peck*, 17 R. I. 55, 20 Atl. 16; *Anderson v. Norton*, 15 Lea (Tenn.) 14, 54 Am. Rep. 400. See "*Partnership*," *Dec. Dig. (Key No.)* §§ 176-190; *Cent. Dig.* §§ 308-347.

<sup>3</sup> In *JACKSON BANK v. DURFEY*, 72 Miss. 971, 18 South. 456, 81 L. R. A. 470, 48 Am. St. Rep. 596, Durfey and Ascher were members

It should be noticed that some of the cases which hold invalid transfers of firm assets by an insolvent partnership do not in reality treat the priority of firm creditors as based upon the right of the partners inter se. The priority is based upon an inherent primary right of the firm creditors themselves,<sup>4</sup> or it is regarded as a property right of the firm creditors, which cannot be destroyed by the partners,<sup>5</sup> or the firm is treated as an entity having its own creditors who must be paid out of its own assets.<sup>6</sup>

of a partnership which was insolvent, as were each of the partners. Durfey was indebted to an individual creditor in the sum of \$5,000 and Ascher was likewise indebted to an individual creditor in the sum of \$5,550. Being so indebted, each, on the same day, made a trust deed of his undivided interest in certain firm property to secure his individual indebtedness. On an attempt by a firm creditor to have the trust deeds set aside, the court said: "The issue is thus sharply presented whether it is lawful for the members of an insolvent firm to convert the joint estate into severalty and appropriate it to the payment of the individual debts of its members, leaving the firm debts unpaid. \* \* \* Durfey had a right to have the partnership property applied to the partnership debts, and Ascher had a like right. While these reciprocal rights existed, they were of value as property rights of the debtors to a certain class of creditors; i. e., firm creditors. Now, it is manifest that, for the very purpose of preventing these creditors from resorting to these rights for the satisfaction of their demands, the rights themselves were waived, and attempted to be obliterated. We are unable to perceive any just principle upon which the right of a debtor can be recognized to thus deal with his estate for the very purpose of obstructing his creditors." *Sanderson v. Stockdale*, 11 Md. 563; *Phelps v. McNeely*, 66 Mo. 554, 27 Am. Rep. 378 (overruled in *Goddard-Peck Grocery Co. v. McCune*, 122 Mo. 426, 25 S. W. 904, 29 L. R. A. 681); *BANNISTER v. MILLER*, 54 N. J. Eq. 121, 32 Atl. 1066; *Miller v. Bannister*, 54 N. J. Eq. 701, 37 Atl. 1117. See "*Partnership*," *Dec. Dig. (Key No.)* §§ 176-190; *Cent. Dig.* §§ 308-347.

<sup>4</sup> *Caldwell v. Scott*, 54 N. H. 414; *Kidder v. Page*, 48 N. H. 380; *Tenney v. Johnson*, 43 N. H. 144. See "*Partnership*," *Dec. Dig. (Key No.)* §§ 176-190; *Cent. Dig.* §§ 308-347.

<sup>5</sup> *Franklin Sugar Refining Co. v. Henderson*, 86 Md. 452, 38 Atl. 991, 63 Am. St. Rep. 524; *Bartlett v. Meyer-Schmidt Grocer Co.*, 65 Ark. 290, 45 S. W. 1063. See "*Partnership*," *Dec. Dig. (Key No.)* §§ 176-190; *Cent. Dig.* §§ 308-347.

<sup>6</sup> *Teague v. Lindsey*, 106 Ala. 266, 17 South. 538. See "*Partnership*," *Dec. Dig. (Key No.)* §§ 176-190; *Cent. Dig.* §§ 308-347.

**SAME—BY ACT OF A SINGLE PARTNER**

- 62. Unless restricted by the partnership agreement, each partner has power to sell those firm assets held for sale. Any sale by a single partner, acting within the scope of the firm business, is effective to pass the title to the firm assets thus sold.**

A discussion of the power of a partner to sell the firm property is found in chapter V.<sup>†</sup> It is only necessary here to refer generally to the subject. Whether expressly provided for in the partnership agreement or not, there is implied a mutual agency among the partners. The limits of this agency, in the absence of express limits provided in the articles of partners, are found in the scope of the firm business. Each partner, within the scope of that business, has power to bind his copartners. In an ordinary trading firm there is an implied power to sell those firm assets held for sale, and in many other kinds of partnership there may be found an express or implied power of sale. In any partnership, trading or nontrading, power in one partner to sell firm property may be found. This power may be established in any of the ways in which the power of agents generally is established. To be effective, the transfer of firm assets by the act of a single partner must be authorized. Furthermore, as to real estate, the authority must be manifested in the proper manner. A transfer of firm assets may fail, as has been seen, because it is fraudulent. Likewise it may fail because made by a partner acting without authority at all, or without authority in proper form, or by a partner with authority, but who fails to comply with the laws of conveyancing. An obvious example of a sale invalid for want of authority is where one partner disposes of the firm assets to pay his separate debts. This is clearly beyond the scope of his implied authority, and

<sup>†</sup> See chapter V, p. 288. The question of the validity of a conveyance of firm property by a single partner to pay his individual debts is also considered there.

in the absence of actual authority, or an estoppel, a buyer under such circumstances acquires no title. Even if he acquired a title, it would be subject to impeachment for fraud on the grounds previously noticed.<sup>8</sup>

### SAME—FORM OF CONVEYANCE

**63. Conveyances of firm property, whether real or personal, must conform to the rules governing conveyances of property generally.**

#### *Form of Transfer—Personal Property*

In the sale of personal property no particular formality is required; a sealed instrument not being necessary. This being true, though in general a partner has no power to bind his copartners by a sealed instrument,<sup>9</sup> the courts incline to treat as surplusage a seal on an instrument assigning an interest in personal property. Therefore an assignment by one partner of such property by a sealed instrument is not necessarily bad merely because of the fact that specific authority to make it was not given.<sup>10</sup>

#### *Same—Real Property*

In the transfer of real estate a deed under seal is generally required. As to be noticed later,<sup>11</sup> sealed documents were not usually regarded as mercantile instruments, and therefore no power in one partner to execute them was ordinarily implied. Express authority previously given, or express subsequent ratification, was necessary. A partner

<sup>8</sup> See, further, chapter V, p. 292.

<sup>9</sup> *HARRISON v. JACKSON*, 7 T. R. 207, Gilmore, Cas. Partnership, 382; *Pollock v. Jones*, 124 Fed. 163, 61 C. C. A. 555; *Gerard v. Basse*, 1 Dall. 119, 1 L. Ed. 63; *Gordon v. Funkhouser*, 100 Va. 675, 42 S. E. 677. See "Partnership," *Dec. Dig. (Key No.)* § 157; *Cent. Dig.* § 205.

<sup>10</sup> *DECKARD v. CASE*, 5 Watts (Pa.) 22, 30 Am. Dec. 287, Gilmore, Cas. Partnership, 233; *TAPLEY v. BUTTERFIELD*, 1 Metc. (Mass.) 515, 35 Am. Dec. 374. Contra: *Pollock v. Jones*, 124 Fed. 163, 61 C. C. A. 555. See "Partnership," *Dec. Dig. (Key No.)* § 157; *Cent. Dig.* § 205.

<sup>11</sup> See chapter V, p. 303.

may, however, make a binding contract to sell firm real estate, if selling such real estate is within the scope of the partnership business. The contract so made will support an action for specific performance against the partnership.<sup>12</sup> If power to sell the firm real estate is established, the conveyance must conform to the rules governing conveyances of real estate generally.

### SUCCESSIVE OR SIMULTANEOUS TRANSFERS OF EACH PARTNER'S INTEREST

64. There are two holdings as to the effect of a transfer of a partner's interest in a partnership:

First: That such a transfer passes title to a share in the corpus of the firm property, subject to the equitable right of the remaining partners to have such property applied in payment of firm debts. According to this holding, successive or simultaneous independent transfers by each partner of his interest in the partnership operate to transfer the legal title to all of the partnership property free from the equitable right of any of the partners.

Second: That a transfer by one partner of his interest passes title to his share of the surplus only. According to this holding, successive or simultaneous independent transfers by each partner of his interest operate to pass title to the undivided surplus only after firm debts are paid and accounts settled.

As has been shown, the interest of a partner in the partnership property is an interest in the surplus which remains after the payment of firm debts and the settlement of accounts between the partners. "The property or effects of a partnership belong to the firm, and not to the partners, each of whom is entitled only to a share of what

<sup>12</sup> *ROVELSKY v. BROWN et al.*, 92 Ala. 522, 9 South. 182, 25 Am. St. Rep. 83, Gilmore, Cas. Partnership, 239. See "*Partnership*," Dec. Dig. (Key No.) § 141; Cent. Dig. § 218.

may remain after payment of the partnership debts, and after a settlement of the accounts between the partners."<sup>13</sup> This is the language of the law of partnership. As we have seen, however, the courts do not recognize the firm as an entity apart from its members. The property and the obligations of the partnership belong to the persons composing the firm. According to the law of property, the legal title to all firm assets is in the partners individually, and it can be alienated only in conformity with the requirements for conveyances of property generally. When, therefore, the courts say that a partner does not own any specific portion of the firm assets, they mean that, while in reality, according to the laws of property, he may own it, he cannot use such ownership in violation of his obligations to his copartners. Courts of equity have read into the partnership agreement a stipulation, binding alike on each member of the firm, that the firm assets shall not be used for individual purposes until the partnership purposes are accomplished. As such stipulation arose from the mutual consent of the partners when they entered into the relation, it can be abrogated only by the same mutuality. One partner, acting independently of the others, cannot escape the restriction thus by common consent imposed upon all. The effect of thus interpreting the partnership contract is to make the interest of each partner in the firm assets nothing more than an interest in the surplus after the payment of the firm debts. A court of equity will compel observance of the partnership agreement in this respect, by preventing one partner from alienating the firm property to pay his separate debts. Thus in *Place v. Sweetzer*<sup>14</sup> a creditor of one partner was enjoined from selling on ex-

<sup>13</sup> *Fourth Nat. Bank v. New Orleans & C. R. Co.*, 78 U. S. 624, 628, 20 L. Ed. 82. See "*Partnership*," *Dec. Dig. (Key No.)* §§ 176-190, 227; *Cent. Dig.* §§ 308-347, 473, 474.

<sup>14</sup> *PLACE v. SWEETZER*, 16 Ohio, 142, Gilmore, *Cas. Partnership*, 511. See, also, *T. Pars. Partn.* (4th Ed.) p. 290, note (c), where cases are collected and the conclusion is reached that equity will at the suit of the debtor's partners or the partnership creditors enjoin the creditor of a single partner from satisfying his execution of the partnership effects until the firm debts are paid. See "*Partnership*," *Dec. Dig. (Key No.)* § 209; *Cent. Dig.* §§ 401, 402.

ecution the debtor partner's interest in the firm assets until an account was had. While perhaps no case can be found where equity has, at the suit of one partner, enjoined a co-partner from attempting to sell an interest in specific firm assets, instances are numerous where equity has taken charge of firm assets at the suit of one partner to prevent the other partner from wasting or dissipating them. Furthermore, so thoroughly has the rule become established, that a partner's interest in the firm assets relates only to the surplus left after the payment of the firm debts, that any alienation by him of his interest in the firm is invariably construed to mean his interest in the surplus, and not his interest in any specific articles of property.

The effect of the sale by a partner of his interest in the firm assets can be viewed in two ways: First, that inasmuch as the legal title to his portion in such assets is really in him, according to the law of property, the sale passes a legal title to such portion, subject, however, to the payment of the firm debts. Second, that no legal title passes, but only the partner's right to the surplus after the partnership debts have been paid. On the first view, the sale by a partner of his interest in the firm assets does affect the firm title pro tanto to the extent of such partner's proportion of the total assets; on the second view, it does not. The necessity of determining which view is correct arises when all the partners, acting independently, sell their respective interests in the firm. For example, A., of the firm of A. B. & C., sells his interest to X., B. his interest to Y., and C. his interest to Z. Is the firm title now gone, and with it the priority of the firm creditors? It is said that this priority is based upon the rights of the partners against one another to have the firm assets applied to the firm debts. It is conceded on all hands that, if all the partners join, they may pass the legal title to the common assets free from the claims of the firm creditors, and that such conveyance is effective, unless impeachable for fraud. If, however, one only sells his interest, the other partners may still insist that the property be applied to the firm debts. But if they all sell successively or simultaneously, but each acting independently of the others, do they

thereby pass the legal title to the entire firm assets free from the claims of firm creditors? There is no doubt that the sale by one partner alone will not produce such effect. Whether a sale by all acting independently will do so depends upon the view one takes of the transaction. On the view first mentioned, by A.'s sale X. acquired a legal title to a portion of the firm assets, charged with the burden of the so-called equity of the other partners. Likewise Y. acquired B.'s interest similarly charged. When C. sold to Z., all the partners now having alienated their interests, their mutual equities are gone, and the legal title is in the three grantees, freed from such equities. Where X. first got a legal title incumbered, he now has it unincumbered. It might be urged, however, that, although by the independent sales by each partner of his interest the title to the entire firm assets passes, the partners still retain their mutual rights to have the property applied to the payment of firm debts, and their grantees take the property subject to such burden, and conceivably the price paid for each interest was fixed with reference to this liability. While it is possible to regard the title thus conveyed as subject to firm debts in cases arising between the partners and their grantees, it is difficult to see how such incumbrance could affect the property if it should be sold to third persons; for, if it be assumed that the legal title to the entire corpus actually passed by the successive sales, then the grantees may convey the title thus acquired to third persons, who would hold it free from the partners' equities. For example, if X., Y. and Z., in the illustration above, should convey their respective interests to M., the entire title would rest in him, and it could not be subjected to any liability growing out of the mutual rights of the partners who formerly owned it.

The leading case holding that the successive independent sales by all the partners of their respective interests passes the legal title to the corpus of the firm property is *Doner v. Stauffer*,<sup>18</sup> where the respective interests of all the part-

<sup>18</sup> *DONER v. STAUFFER*, 1 Pen. & W. (Pa.) 198, 21 Am. Dec. 870, Gilmore, Cas. Partnership, 247. In *First Nat. Bank of Indianapolis v. Brubaker*, 128 Iowa, 587, 105 N. W. 116, 2 L. R. A. (N. S.) 256, 111 Am. St. Rep. 209, the partners, acting independently, sold

ners were sold on execution in favor of their separate creditors. No distinction apparently is made between voluntary and involuntary sales. The leading case holding that the sales by all the partners of their respective interests in the partnership do not affect the corpus of the firm property, but convey only a right to the surplus after the firm

their respective interest in the firm assets. The court denied the claim of the firm creditors to priority, on the ground apparently that the partners had released their mutual equities.

"The injustice, and, it may be said, the absurdities, which result from such a view, lead to an inquiry into its correctness. A firm may be perfectly solvent, though the members are individually insolvent, and yet in such a case the doctrine that the property of the firm is divested, and the equities of the partners and partnership creditors are extinguished, by separate transfers of the individual interests of all the partners, might result, not only in an appropriation of all the properties of the firm to the payment of the individual debts, to the entire exclusion of the firm creditors, but to a most unjustifiable sacrifice and waste of such properties. For instance, suppose a firm to consist of three members, each having an equal interest, and to be possessed of assets to the amount of \$300,000, and to owe debts to half of that amount; the interest of each partner, supposing their accounts between themselves to be even, is \$50,000. The members of the firm are individually indebted. One of them sells his share, and receives for it \$50,000, which is its actual value. The share of another of the partners is sold under execution, and brings its full value, \$50,000. Thus far one partner remains, and he has an equity to have the firm debts paid, and those who have sold out are protected against those debts. The purchasers of the separate interests are entitled to the surplus only. The joint creditors still have their recourse against the partnership property, and the right to levy on such of it as is subject to sale on execution; but before any levy the remaining partner sells out his individual interest, or it is sold on execution. According to the doctrine applied in the present case, and maintained in the case of *Coover's Appeal* [29 Pa. 9, 70 Am. Dec. 149], *supra*, the firm property is by this last sale relieved from the partnership debts, the two shares first sold are at once changed from interests in the surplus to shares in the corpus of the property free from the debts, their value is doubled, and the fund which should have gone to pay the joint debts is, without any consideration, appropriated by the transferees of the individual interests of the partners." *Rapallo, J., in MENAGH v. WHITWELL*, 52 N. Y. 146, 11 Am. Rep. 683, *Gilmore, Cas. Partnership*, 251, 255. See "*Partnership*," *Dec. Dig. (Key No.)* §§ 176-190, 227; *Cent. Dig.* §§ 308-347, 473, 474.

debts are paid, is *Menagh v. Whitwell*.<sup>16</sup> This case was decided on the assumption that there was no intention to convey more than each partner's interest in the undivided surplus. Had an intention to transfer an interest in the corpus of the property been clearly shown, and had a final conveyance been made to an innocent purchaser for value, and had there been an attempt to reach the property in his hands, the question would have arisen as to the nature of the restriction on a partner's selling power. Is a partner under a total inability to convey any part of the corpus of the firm property, or can he convey a part of the corpus in such property, subject, however, to the equities of the other partners? If he can make such a conveyance, then separate transfers by each member of a firm, with the intention of passing title to firm property, would, if the interests conveyed became united in the hands of an innocent purchaser for value, give him a legal and unincumbered

<sup>16</sup> *MENAGH v. WHITWELL*, 52 N. Y. 146, 11 Am. Rep. 683, Gilmore, Cas. Partnership, 251. In this case there was a firm of five persons, each owning a one-fifth interest. Two of them sold their interest to a third member, who thereby became an owner of three-fifths interest in the firm. The owner of the three-fifths interest mortgaged it to X., the plaintiff. Another partner mortgaged his one-fifth to Y. Plaintiff by foreclosure acquired title to the three-fifths interest of his mortgage, and Y. acquired the interest of his mortgagor. The remaining partner afterwards sold his one-fifth interest to a stranger. It was held that, if the intent was to convey an interest in the corpus, the mortgages were in fraud of creditors and void; that, on the assumption that the mortgages were intended to pass an interest in the surplus only, no share in the corpus of the property passed, and each partner would have the right to see that the property itself was applied to the payment of firm debts. Rapallo, J., said: "I do not see how this right can be affected by the question whether the separate interest of all or only one of the partners is thus sold. Each of the purchasers would acquire an interest merely in the surplus, and each partner whose interest was sold would have the right to indemnity against the firm debts by the application to such debts of so much of the property as might be necessary for the purpose. These debts must have been taken into consideration in fixing the price of the interest sold, and consequently allowed to the purchaser, and the partnership assets are the primary fund for their payment." See "*Partnership*," Dec. Dig. (Key No.) § 227; Cent. Dig. §§ 473-474.

title. The case of *Menagh v. Whitwell*, however, seems to incline to the view that a partner is under a total disability to convey more than his share of the surplus. Rapallo, J., in the latter part of his opinion, said: "Until some act is done by the firm to transfer the joint interest, no separate act of either or all of the partners, or proceedings against them individually with reference to their individual interests, should be held to affect the title of the firm, so as to preclude a creditor of the firm, having a judgment and execution, from levying on the joint property." It is manifest that, if a partner can sell nothing but his surplus, the doctrine of protection of purchaser for value without notice will have no application. The purchaser cannot get anything that the firm creditors have a claim upon, because the partner himself can sell nothing that they are entitled to.<sup>17</sup> Further, if it be true that a partner cannot by his independent sale pass any legal title to his share of the corpus of the firm property, then partnership ownership of property differs fundamentally from the ordinary ownership of tenants in common, for there is no doubt that, by the law of property governing tenancies in common, each co-owner by his independent sale can pass a legal title to his share of the common property. Again, if it be said that a partner, like a cotenant, can by his independent sale pass a legal title to his share of the common property, but that such share is subject to the claim which his copartners have, by virtue of the partnership agreement, against the common property to have it applied to the payment of the firm debts, then this is an exceptional form of co-ownership; for, by the law of property governing ordinary tenancy in common, a purchaser from a cotenant of his individual interest would take it free from any claim which the other cotenants might have upon the share by virtue of any contract between such cotenants, unless the claim were evi-

<sup>17</sup> *Tuller v. Leaverton*, 148 Iowa, 162, 121 N. W. 515; *PRATT v. McGUINNESS*, 173 Mass. 170, 53 N. E. 380, *Gilmore, Cas. Partnership*, 212; *Ewart v. Nave-McCord Mercantile Co.*, 130 Mo. 112, 31 S. W. 1041; *Kenneweg v. Schilansky*, 45 W. Va. 521, 31 S. E. 940. See "*Partnership*," *Dec. Dig. (Key No.)* § 227; *Cent. Dig.* §§ 473-474.

denced by mortgage or in some other way, so that the purchaser could be said to have bought with notice of the incumbrance.

### EFFECT OF DEATH OF PARTNER ON PARTNERSHIP PROPERTY

65. Upon the death of a partner the legal title to the choses in action and to the chattels of the partnership vests in the surviving partner; in England the legal title to real estate vests also in the surviving partner; in the United States it vests in the heir of the deceased partner, according to his interest therein.
66. Whatever legal title vests in the surviving partner is not for his sole benefit, but for the purpose of paying the firm debts and settling the affairs of the partnership. The legal title to the real estate in the hands of the heir is subject to being charged by the surviving partner for the same purpose.

It is well settled that survivorship, which is characteristic of joint tenancies, does not apply to property held by partners.<sup>18</sup> When, however, it is said that there is no survivorship in partnership assets, it is meant merely that there is no beneficial survivorship. The legal title may survive, but not for the benefit of the survivor.

#### *Same—Choses in Action*

So far as the legal title to the choses in action of a partnership is concerned, there is no doubt now that it survives, though an early case<sup>19</sup> held that an action on a firm debt was properly brought by a surviving partner and the representative of a deceased partner jointly. The case is,

<sup>18</sup> Coke's Littleton, 182A; *JEFFEREYS v. SMALL*, 1 Vern. 217, Gilmore, Cas. Partnership, 288. See "Partnership," Dec. Dig. (Key No.) § 246; Cent. Dig. § 520.

<sup>19</sup> *Hall v. Huffman*, 3 Kebb. 798. See "Partnership," Dec. Dig. (Key No.) §§ 243-245, 258; Cent. Dig. §§ 509-518, 564½.

however, clearly contra to the later cases and to the overwhelming weight of authority.<sup>20</sup> The legal title is viewed as devolving upon the survivor in his own right. He is not an assignee of his deceased partner's interest.<sup>21</sup> He is the only proper party to sue and to be sued with respect to the partnership obligations and property.<sup>22</sup>

<sup>20</sup> *BUCKLEY v. BARBER*, 6 Exch. 164; *Kemp v. Andrews*, Carth, 170; *Dixon v. Hammond*, 2 B. & A. 310; *Gamble v. Rural Independent School Dist. of Allison* (C. C.) 132 Fed. 514; *ANDREWS' HEIRS v. BROWN'S ADM'R*, 21 Ala. 437, 56 Am. Dec. 252, *Gilmore, Cas. Partnership*, 267; *Newman v. Gates*, 165 Ind. 171, 72 N. E. 638; *BASSETT v. MILLER*, 39 Mich. 133, *Gilmore, Cas. Partnership*, 271; *STEARNS v. HOUGHTON*, 38 Vt. 584, *Gilmore, Cas. Partnership*, 273. See "*Partnership*," *Dec. Dig. (Key No.)* §§ 243-245; *Cent. Dig.* §§ 509-518.

<sup>21</sup> *NEHRBOSS v. BLISS*, 88 N. Y. 600. See "*Partnership*," *Dec. Dig. (Key No.)* §§ 243-247; *Cent. Dig.* §§ 509-528.

<sup>22</sup> Cases in note 20 above.

In *ADAMS v. HACKETT*, 27 N. H. 289, 59 Am. Dec. 376, *Gilmore, Cas. Partnership*, 274, an action was brought on promises made to the plaintiff as the surviving partner of the firm of J. G. Bancroft & Co., and as surviving partner of the firm of G. A. & J. Q. Adams, and also upon promises made to the plaintiff in his individual capacity. It was objected that the causes of action could not be joined, as they accrued in different rights. The court held that there was no objection to joining them, saying: "It is not disputed that the plaintiff is the surviving partner of the two firms, and it is well settled that where a firm consists of two persons, and one of them dies, the rights of action which were vested in the firm survive to the remaining member, not to him as to an administrator or executor, representing another person, but as the survivor of the partnership, representing himself, and being all that is left of the firm. The cause of action is in him; and hence it has been often held that, in an action at the suit of a surviving partner, he may include a count for a debt due to himself in his own right, as both causes of action are in him. *Slipper v. Stidstone*, 5 T. R. 493; *French v. Andrade*, 6 T. R. 582; *Golding v. Vaughan*, 2 Chit. 436; *Richards v. Heather*, 1 B. & A. 29; *Smith v. Barrow*, 2 T. R. 476. \* \* \*

As it is clear upon authority that a surviving partner may, in an action brought by him as such survivor, include in his declaration a count for a debt due to himself in his own right, no reason occurs to us why he may not also, in the same suit, join another count for a debt accruing to him as survivor of another firm. The causes of action are all in him, and the principle in the one case must be the same as in the other." See, also, *Hewitt v. Hayes*, 204 Mass. 586, 90 N. E. 985, 27 L. R. A. (N. S.) 154; *HOLBROOK v. LACKEY*, 18

*Same—Ordinary Chattels*

There can be no doubt that in the United States the legal title to ordinary chattels survives, despite the disfavor with which joint tenancy in land is viewed.<sup>23</sup> In England there has been some doubt upon this point, however, and in 1851, in a case holding that the chattels of a partnership might be seized under a *fi. fa.* issued on a judgment obtained against the executors of a deceased partner on his separate debt,<sup>24</sup> Baron Parke said there was "no satisfactory authority for the position that the title to partnership chattels survives at law, and the authorities the other way greatly predominate." This view has since been characterized<sup>25</sup> as "the peculiar views on the subject once taken by the Court of Exchequer," and can hardly be said to represent the law in England at the present time.<sup>26</sup>

*Same—Real Estate*

The doctrine of conversion of firm realty into personalty has already been explained.<sup>27</sup> Under the English rule of out and out conversion the legal title to firm realty apparently vests, upon the death of one partner, in the survivor. This is true where the title is held jointly, and the result in such cases may be explained as due to the general rule of survivorship applicable to joint estates.<sup>28</sup> Where the title stands in the name of the deceased partner only, it

Metc. (Mass.) 132, 46 Am. Dec. 726. See "*Partnership*," *Dec. Dig.* (Key No.) §§ 243-247, 258; *Cent. Dig.* §§ 509-528, 564½, 569-575.

<sup>23</sup> *ANDREWS' HEIRS v. BROWN'S ADM'R*, 21 Ala. 437, 56 Am. Dec. 252, Gilmore, Cas. Partnership, 267; *Didlake v. Roden Grocery Co.*, 160 Ala. 484, 49 South. 384, 22 L. R. A. (N. S.) 907; *BASSETT v. MILLER*, 39 Mich. 133, Gilmore, Cas. Partnership, 271. See "*Partnership*," *Dec. Dig.* (Key No.) § 245; *Cent. Dig.* § 514.

<sup>24</sup> By Partnership Act, 1890, § 23, it is no longer possible to levy on firm property, except on a judgment against the firm.

<sup>25</sup> By Lord Justice James in *Taylor v. Taylor*, 28 L. T. R. 189. See "*Partnership*," *Dec. Dig.* (Key No.) §§ 243-247; *Cent. Dig.* §§ 509-528.

<sup>26</sup> *KNOX v. GYE*, L. R. 5 E. & I. App. 656. See quotation from this case in note 33, post. See "*Partnership*," *Dec. Dig.* (Key No.) §§ 243-247; *Cent. Dig.* §§ 509-528.

<sup>27</sup> See section 53, p. 154, ante.

<sup>28</sup> *Lindley's Law of Partnership* (7th Ed.) p. 379; *JEFFEREYS v. SMALL*, 1 Vern. 217, Gilmore, Cas. Partnership, 266; *Elliot v.*

would seem to go to his heirs in the usual way, subject to being divested pursuant to the partnership agreement.<sup>29</sup> In the United States, while the doctrine of *pro tanto* conversion is quite generally recognized, the legal title to firm realty goes, upon the death of one partner, to his heirs, according to the rules governing devolution of property upon the death of the owner. If the legal title stands in the name of the deceased partner, it passes to his heirs; if in the names of both partners, the share of the deceased devolves upon his heirs after the manner of estate held in common. The fact that the title thus passes does not, however, release it from the partnership obligations. The surviving partner has the power to charge such realty for the payment of debts and the settlement of partnership accounts. While he has not the legal title, still he can, in the settlement of the firm business, convey an equitable title; that is, he can confer upon a grantee his right to have the real estate charged with the payment of firm debts, and a court of equity will recognize such right by compelling the heir to divest himself of the legal estate. Thus, in *Delmonico v. Guillaume*,<sup>30</sup> a surviving partner, in order to aid in paying firm debts, entered into a written contract with the defendant to convey certain firm realty. Defendant refused to accept the conveyance, on the ground that one-third of the legal title was outstanding in the infant heir of one of the deceased partners. In a suit by the surviving partner for specific performance, in which the infant heir was a defendant, the court held for plaintiff and ordered the guardian ad litem of the infant to join in the conveyance. The court said: "In this case \* \* \* the surviving partner, \* \* \* as between himself and the heir, \* \* \* had an absolute right to dispose of it

Brown, 3 Swanst. 489, note. See, also, Partnership Act, 1890, § 20 (2). See "*Partnership*," *Dec. Dig. (Key No.)* § 246; *Cent. Dig.* §§ 519-523.

<sup>29</sup> Since Land Transfer Act, 1897 (60 & 61 Vict. c. 65) §§ 1, 25, the legal title would devolve upon the legal personal representative of the real property.

<sup>30</sup> *DELMONICO v. GUILLAUME*, 2 Sand. Ch. (N. Y.) 366. See "*Partnership*," *Dec. Dig. (Key No.)* § 246; *Cent. Dig.* §§ 519-523.

[the land] for the payment of the debts of the firm, in the same manner as if it had been personal estate. \* \* \* There is no doubt that the legal title is vested in the infant defendant to the extent of one undivided half of the lots contracted to Guillaume. But, the equitable right and interest being vested in the surviving partner, the infant is a mere trustee of the legal title, and the court of chancery must compel a conveyance of the estate upon the application of such surviving partner."<sup>81</sup> While it is well settled that equity will compel the heir of a deceased partner to convey the legal title to any firm real estate which may have devolved upon him, where such real estate is needed for the payment of firm debts, it would seem that equity would also compel a divestment of the legal title whenever necessary for the proper adjustment and settlement of the partnership affairs.

### SURVIVING PARTNER AS QUASI TRUSTEE

67. The surviving partner succeeds to the firm assets, subject to the same obligations of honesty, fidelity, and integrity as when the partnership was in being. He is bound to pay the firm debts and distribute the balance of the assets among the partners and their representatives according to their respective interests. He must perform his duty with diligence and in full recognition of his fiduciary capacity, and he is accountable to the representatives of the deceased partner for any misconduct.

Upon the death of a member of a partnership, the surviving partner becomes the representative of the firm. Upon him devolve all the assets of the partnership, and upon him rests the duty of bringing the affairs of the firm to a close.

<sup>81</sup> *Barton v. Lovejoy*, 56 Minn. 380, 57 N. W. 935, 45 Am. St. Rep. 482; *Tillinghast v. Champlin*, 4 R. I. 173, 67 Am. Dec. 510; *Pierce's Adm'r v. Trigg's Heirs*, 10 Leigh (Va.) 406. See "*Partnership*," *Dec. Dig. (Key No.)* § 246; *Cent. Dig.* §§ 519-523.

This includes the collection of the obligations due the firm, reducing to possession all the firm property, paying the firm debts, making a complete accounting of the firm business, and distributing the net assets, according to the interests of the several partners or their representatives.<sup>22</sup> The mutual obligations of honesty, good faith, and integrity resting upon the partners during the continuance of the firm are in no way relaxed upon the death of a member. The survivor owes the same fidelity to the representatives of his deceased copartner. He is bound to administer the affairs of the firm and to wind up its business in full recognition of his fiduciary relation. While he is not, accurately speaking, a trustee, and does not hold the firm assets in trust for the deceased partner's representatives,<sup>23</sup>

<sup>22</sup> *Kenton Furnace R. & Mfg. Co. v. McAlpin* (C. C.) 5 Fed. 737; *In re F. Dobert & Son* (D. C.) 165 Fed. 749; *Word v. Word*, 90 Ala. 81, 7 South. 412; *McElroy v. Whitney*, 12 Idaho, 512, 88 Pac. 349; *Beale v. Beale* (Ill.) 2 N. E. 65 (1885); *Swafford's Adm'r v. White*, 89 S. W. 129, 28 Ky. Law Rep. 119; *Mathison v. Field*, 3 Rob. (La.) 44; *Cockerham v. Bosley*, 52 La. Ann. 65, 26 South. 814; *Hamlin v. Mansfield*, 88 Me. 131, 33 Atl. 788; *Walker v. House*, 4 Md. Ch. 39; *Heath v. Waters*, 40 Mich. 457; *McCaughan v. Brown*, 76 Miss. 496, 25 South. 155; *Scudder v. Ames*, 142 Mo. 187, 43 S. W. 659; *Haynes v. Brooks*, 8 Civ. Proc. R. (N. Y.) 106; *Lockwood v. Mitchell*, 7 Ohio St. 387, 70 Am. Dec. 78; *Hanna v. Wray*, 77 Pa. 27.

For further discussion of the rights and duties of the surviving partner, see post, chapter V, § 122. See "*Partnership*," *Dec. Dig.* (Key No.) §§ 243-255; *Cent. Dig.* §§ 509-561.

<sup>23</sup> In *KNOX v. GYE*, L. R. 5 H. L. 656, *Gilmore, Cas. Partnership*, 280, note, in holding that an action by the executor of the deceased partner against the surviving partner was barred by the statute of limitations, Lord Westbury said: "In deciding this case, it must be recollected that the representative of a deceased partner has no specific interest in or claim upon any particular part of the partnership estate. The whole property therein accrues to the surviving partner; and he is the owner thereof, both at law and in equity. The right of the deceased partner's representative consists in having an account of the property, of its collection and application, and in receiving that portion of the clear balance that accrues to the deceased's share and interest in the partnership. Another source of error in this matter is the looseness with which the word 'trustee' is frequently used. The surviving partner is often called a 'trustee'; but the term is used inaccurately. He is not a trustee, either expressly or by implication. On the death of a

yet there are many analogies between his duties and those of an ordinary trustee.<sup>54</sup> He will not be allowed to exercise his power of disposal over the firm assets to his private advantage.<sup>55</sup> In closing up the partnership business, and disposing of the firm property, he cannot buy it himself. "This is so, not only because his duty as seller and his interest as purchaser are in irreconcilable conflict, but for the more cogent reason that it is indispensable to every legal contract of sale and purchase that there be two contracting parties competent to enter into a binding engagement with each other."<sup>56</sup> Yet he may buy the interest of a deceased partner from his personal representatives, if the sale is made in good faith, and thus prevent the necessity of a sale

partner, the law confers on his representatives certain rights as against the surviving partner, and imposes on the latter correspondent obligations. The surviving partner may be called, so far as these obligations extend, a trustee for the deceased partner; but, when these obligations have been fulfilled, or are discharged, or terminate by law, the supposed trust is at an end. \* \* \* In like manner here the surviving partner may be called a trustee for the dead man; but the trust is limited to the discharge of the obligation, which is liable to be barred by lapse of time. As between the express trustee and the cestui que trust, time will not run; but the surviving partner is not a trustee in that full and proper sense of the word. \* \* \* There is nothing fiduciary between the surviving partner and the dead partner's representative, except that they may respectively sue each other in equity. There are certain legal rights and duties which attach to them; but it is a mistake to apply the word 'trust' to the legal relation which is thereby created." See, also, *Krueger v. Speith*, 8 Mont. 482, 20 Pac. 664, 3 L. R. A. 291. See "*Partnership*," *Dec. Dig. (Key No.)* §§ 243-255; *Cent. Dig.* §§ 509-561.

<sup>54</sup> *Porter v. Long*, 136 Mich. 150, 98 N. W. 990 (chargeable with interest on interest); *Egan v. Wirth*, 26 R. I. 363, 58 Atl. 987 (accountable for profits); *Rowell v. Rowell*, 122 Wis. 1, 99 N. W. 473 (accountable for good will). See "*Partnership*," *Dec. Dig. (Key No.)* §§ 243-255; *Cent. Dig.* §§ 509-561.

<sup>55</sup> *Gable v. Williams*, 59 Md. 46; *DEWEY v. CHAPIN*, 156 Mass. 35, 30 N. E. 223. See "*Partnership*," *Dec. Dig. (Key No.)* §§ 243-255; *Cent. Dig.* §§ 509-561.

<sup>56</sup> *VALENTINE et al. v. WYSOR*, 123 Ind. 47, 23 N. E. 1076, 7 L. R. A. 788, *Gilmore, Cas. Partnership*, 275, 279; *Didlake v. Roden Grocery Co.*, 160 Ala. 484, 49 South. 384, 22 L. R. A. (N. S.) 907. See "*Partnership*," *Dec. Dig. (Key No.)* §§ 251, 254; *Cent. Dig.* §§ 537, 551.

of the partnership property and an accounting of the firm assets.<sup>37</sup> He may even buy from them such legal title to the partnership property as passed to them or to the heirs of the deceased, provided they are vested with a power of sale over such property.<sup>38</sup> The reason that would prevent a surviving partner from selling to himself "has no application to a case where a surviving partner purchases property from the executor or administrator of the deceased, and hence the rule which would govern the one case cannot control the other."<sup>39</sup>

In England,<sup>40</sup> and in some jurisdictions in the United States, the trusteeship of the surviving partner is denied.<sup>41</sup> According to these cases "the right of the legal personal representative of the deceased partner is to an account merely of the partnership assets, and to the taking of that, as to the taking of any other account, the statute of limitations applies."<sup>42</sup>

<sup>37</sup> In re Silkman, 190 N. Y. 560, 83 N. E. 1131. See "Partnership," *Dec. Dig. (Key No.)* §§ 243-255; *Cent. Dig.* §§ 509-561.

<sup>38</sup> Chambers v. Howell, 11 Beav. 6; Brown v. Slee, 103 U. S. 828, 26 L. Ed. 618; Baird v. Baird's Heirs, 21 N. C. 524, 31 Am. Dec. 399; Roys v. Villas, 18 Wis. 169. See, also, Mulherin v. Rice, 106 Ga. 810, 32 S. E. 805. See "Partnership," *Dec. Dig. (Key No.)* §§ 243-255; *Cent. Dig.* §§ 509-561.

<sup>39</sup> Kimball v. Lincoln, 99 Ill. 578, 586. See "Partnership," *Dec. Dig. (Key No.)* §§ 251, 254; *Cent. Dig.* §§ 537, 551.

<sup>40</sup> See ante, note 33, p. 209.

<sup>41</sup> BUSH v. CLARK, 127 Mass. 111; Mutual Life Ins. Co. of New York v. Sturges, 33 N. J. Eq. 328; Hogg's Ex'rs v. Ashe, 2 N. C. 471. See "Partnership," *Dec. Dig. (Key No.)* §§ 243-255; *Cent. Dig.* §§ 509-561.

<sup>42</sup> Taylor v. Taylor, 28 L. T. R. N. S. 189, 190; KNOX v. GYE, L. R. 5 H. L. 656, Gilmore, *Cas. Partnership*, 280, note.

See, however, McPherson v. Swift, 22 S. D. 165, 116 N. W. 76, 133 Am. St. Rep. 907, where it was held that an action in equity to ascertain and recover a deceased partner's interest in the ultimate distribution of partnership assets was not an action on a contract, and was not barred by the lapse of the statutory period of six years.

The English Partnership Act, 1890, § 43, provides: "Subject to any agreement between the partners, the amount due from surviving or continuing partners to an outgoing partner or the representatives of a deceased partner in respect to the outgoing or deceased partner's share is a debt accruing at the date of the dissolution or

*Rights of Representatives of Deceased Partner*

The duty of the surviving partner to wind up the firm business, pay the firm debts, and distribute the residue is owed to the representatives of the deceased partner,<sup>43</sup> who may "invoke the interference of a court of equity, and compel such a disposition of the partnership effects as will be just and proper; this, because, as between the partners, and therefore as between the surviving partner and the personal representatives of the deceased partner, the joint assets constitute a fund to be apportioned primarily to the discharge of partnership liabilities." <sup>44</sup> The representatives of the deceased partner are entitled to his share of the balance that may be left after the partnership affairs have been settled. They have the same right that the surviving partner has to require that the firm assets be applied to the payment of the firm debts, and they may call upon the survivor for an accounting to ascertain the condition of the partnership business.<sup>45</sup>

death." See "*Partnership*," *Dec. Dig. (Key No.)* §§ 243-255; *Cent. Dig.* §§ 509-561.

<sup>43</sup> The surviving partner is in no sense a trustee for the firm creditors. *Burchinell v. Koon*, 25 Colo. 59, 52 Pac. 1100; *Fairbanks, Morse & Co. v. Welshans*, 55 Neb. 362, 75 N. W. 865.

As to the remedies of firm creditors against the surviving partner and the estate of the deceased partner, see chapter IV, §§ 72, 73, pp. 227, 231, and chapter VII, § 152, p. 457. See "*Partnership*," *Dec. Dig. (Key No.)* §§ 243-255; *Cent. Dig.* §§ 509-561.

<sup>44</sup> *EMERSON v. SENTER*, 118 U. S. 3, 6 Sup. Ct. 981, 30 L. Ed. 49; *Sigourney v. Munn*, 7 Conn. 11; *People v. White*, 11 Ill. 341; *Fletcher v. Vandusen*, 52 Iowa, 448, 8 N. W. 488; *Cockerham v. Bosley*, 52 La. Ann. 65, 26 South. 814; *Gable v. Williams*, 59 Md. 46; *Jones v. Dexter*, 130 Mass. 380, 39 Am. Rep. 459.

A continuance of the business with the old assets, an intermingling of the firm assets with the survivors' individual assets, and a failure to keep separate accounts constitute an abuse of trust and will be ground for an injunction, receiver, and accounting. *Jennings' Adm'r v. Chandler*, 10 Wls. 21; *Hooley v. Gieve*, 9 Daly (N. Y.) 104. See "*Partnership*," *Dec. Dig. (Key No.)* §§ 243-255; *Cent. Dig.* §§ 509-561.

<sup>45</sup> *Freeman v. Freeman*, 136 Mass. 260; *Hoard v. Clum*, 31 Minn. 186, 17 N. W. 275; *Egberts v. Wood*, 3 Paige (N. Y.) 517, 24 Am. Dec. 236; *Watkins v. Fakes*, 5 Helsk. (Tenn.) 185; *Hoyt v. Sprague*, 103 U. S. 613, 26 L. Ed. 585. See "*Partnership*," *Dec. Dig. (Key No.)* §§ 243-255; *Cent. Dig.* §§ 509-561.

*Same—Survivor Liable for Deficiency on Sale of Assets—  
Following Assets Wrongfully Sold*

The fiduciary obligations of the surviving partner require him to use due diligence to dispose of the assets to the best advantage. If he sacrifices them by a sale at less than their true value, the representatives of the deceased partner may compel him to make up the deficiency. They may also compel the purchaser of the assets, who has colluded with the survivor in the improper sale, to account for their true value, notwithstanding they may have already taken judgment against the survivor for such breach of trust. If the fraudulent purchaser still has the assets in his possession, they may be recovered and applied to the payment of the firm debts.<sup>46</sup>

The right to dispose of partnership property comes to the surviving partner, subject to the equity of the deceased partner to have such property applied in payment of the firm debts. If he uses it for his personal benefit, he does so at his own risk,<sup>47</sup> and he is liable to the representatives of the deceased for the deceased's ratable share of any profit he may make out of such use of firm property.<sup>48</sup>

*The Title of the Surviving Partner is Held for Firm Creditors*

The fact that the legal title to the chattels of the firm vests in the surviving partner does not enable his separate creditors to reach such assets for the payment of their debts to the prejudice of the firm creditors. Thus, if the surviving partner's separate creditors obtain judgment against him on his individual debt and seize the firm assets in his hands, the representatives of the deceased partner may by a bill in equity prevent the satisfaction of the sep-

<sup>46</sup> *RUSSELL v. McCALL*, 141 N. Y. 437, 36 N. E. 498, 38 Am. St. Rep. 807; *DEWEY v. CHAPIN*, 156 Mass. 35, 30 N. E. 223. See "Partnership," *Dec. Dig. (Key No.)* § 245; *Cent. Dig.* §§ 514-518.

<sup>47</sup> *Morgan v. Morgan*, 68 Ala. 80; *Fitz v. Reichard*, 20 La. Ann. 549; *Bauchle v. Smylie*, 104 App. Div. 513, 93 N. Y. Supp. 709; *Hibberd v. Hubbard*, 211 Pa. 331, 60 Atl. 911. See "Partnership," *Dec. Dig. (Key No.)* §§ 243-255; *Cent. Dig.* §§ 509-561.

<sup>48</sup> *Booth v. Parkes, Beatty*, 444; *Painter's Ex'rs v. Painter*, 133 Cal. xix, 65 Pac. 136; *Oliver v. Forrester*, 96 Ill. 315; *Young v. Scoville*, 99 Iowa, 177, 68 N. W. 670; *Roberts v. Hendrickson*, 75 Mo. App. 484. See "Partnership," *Dec. Dig. (Key No.)* §§ 243-255; *Cent. Dig.* §§ 509-561.

arate creditors out of the assets thus seized until the firm debts have been paid and the claims of the firm against the survivor have been settled.<sup>49</sup> Also, if the surviving partner becomes insolvent and assigns all his property for the benefit of creditors, or is adjudicated a bankrupt, the firm assets in his hands pass to his assignee, subject to the payment of the firm creditors.<sup>50</sup>

*Same—Choses in Action*

In the case of choses in action the foregoing principles receive a modification to such an extent that a separate creditor of a surviving partner does gain an advantage by the survivorship of the legal remedies. The surviving partner is the only proper party to bring actions on firm obligations,<sup>51</sup> and this he may do in his own name.<sup>52</sup> When thus suing on a debt due to his firm, the defendant may set off a claim due from the surviving partner individually.<sup>53</sup> Or when he is sued on a firm debt he may set off his individual debt against the plaintiff.<sup>54</sup> Or if he is sued on a debt owed by him individually he may set off a firm debt due to him as survivor.<sup>55</sup> Or if he sues on his own private claim a partnership debt may be set off against it.<sup>56</sup>

<sup>49</sup> *MADDOCK'S ADM'X v. SKINKER*, 93 Va. 479, 25 S. E. 535. See "*Partnership*," *Dec. Dig. (Key No.)* §§ 243-255; *Cent. Dig.* §§ 509-561.

<sup>50</sup> *Preston v. Fitch*, 137 N. Y. 41, 33 N. E. 77; *Ex parte Leaf*, *In re Simpson & Windross*, 4 Deac. 287; *Ex parte MANCHESTER BANK*, *In re MELLOR*, 12 Ch. D. 917. See "*Partnership*," *Dec. Dig. (Key No.)* §§ 243-255; *Cent. Dig.* §§ 509-561.

<sup>51</sup> See note 20, p. 205, ante.

<sup>52</sup> *Smith v. Wood*, 31 Md. 293; *Meador v. Leslie*, 2 Vt. 569; *Brown v. Allen*, 35 Iowa, 306, contra. See "*Partnership*," *Dec. Dig. (Key No.)* §§ 243-258; *Cent. Dig.* §§ 509-598.

<sup>53</sup> *White v. Union Ins. Co.*, 1 Nott & McC. (S. C.) 556, 9 Am. Dec. 720. See "*Partnership*," *Dec. Dig. (Key No.)* §§ 176-189; *Cent. Dig.* §§ 308-348; "*Set-Off and Counterclaim*," *Dec. Dig. (Key No.)* §§ 44, 45; *Cent. Dig.* §§ 82-99.

<sup>54</sup> *Lewis v. Culbertson*, 11 Serg. & R. (Pa.) 48, 14 Am. Dec. 607. See "*Set-Off and Counterclaim*," *Dec. Dig. (Key No.)* §§ 44, 45; *Cent. Dig.* §§ 82-99.

<sup>55</sup> *Slipper v. Stidstone*, 5 T. R. 493; *Johnson v. Kaiser*, 40 N. J. Law, 286. See "*Set-Off and Counterclaim*," *Dec. Dig. (Key No.)* §§ 44, 45; *Cent. Dig.* §§ 82-99.

<sup>56</sup> *French v. Andrade*, 6 T. R. 582. See "*Set-Off and Counterclaim*," *Dec. Dig. (Key No.)* §§ 44, 45; *Cent. Dig.* §§ 82-99.

**AGREEMENT OF PARTNERS CONTROLLING  
PROPERTY AFTER DEATH  
OF PARTNER**

- 68.** The members of a partnership may agree in advance that on the death of one of them his interest shall pass to a third person or to the surviving partners.

It is not infrequently provided in partnership articles that on the death of one partner his share shall go to a person of his nomination. This agreement is binding upon the surviving partners, they thereby waiving their right to object to the introduction of a new member into the firm. Moreover, it has been held that the nominee may enforce this right, even though there has been no direct assignment to him, and even though the jurisdiction in which the partnership exists does not permit a third person to sue on a contract made for his benefit. It is held that a trust is created in his favor by the agreement which the courts will enforce.<sup>57</sup> The agreement between the partners is, of course, not obligatory upon the person named, and he has a right to inform himself of the condition of the partnership before deciding to become a member, though he cannot demand a formal accounting.<sup>58</sup> If he decides to come in, he must comply with the terms upon which he was en-

<sup>57</sup> Thus in *Page v. Cox*, 10 Hare, 163, by agreement of the partners, the widow of one of them was, at his decease, to be admitted into partnership with the others. The same partner had previously made a will by which he bequeathed his interest in the stock and trade to other persons. Upon his death the widow entered into the partnership and made a conveyance of her interest. A claim was made under the will, but it was held that the partnership agreement took the property out of the will and left the legal title in the survivor, impressed with a trust in favor of the widow; that the trust did not interfere with the disposal of the firm property during the life of the deceased, because it was not to arise until his death; and that it was not the less enforceable because it was founded on contract. See, further, chapter II, § 22, at page 73. See "*Partnership*," *Dec. Dig. (Key No.)* §§ 243-255; *Cent. Dig.* §§ 509-561.

<sup>58</sup> *Pigott v. Bagley*, McCl. & Y. 569. See "*Partnership*," *Dec. Dig. (Key No.)* §§ 243-255, 298; *Cent. Dig.* §§ 509-561, 685, 686.

titled to do so.<sup>59</sup> Upon the admission of a new member under a partnership agreement in place of the deceased, there is no need for an accounting, and the assignable rights of the old firm vest in the new one.<sup>60</sup> It may also be that the partners agree among themselves that in the event of the death of one of them the sole right to the assets of the partnership and to continue the business of the partnership shall vest in the survivors. In such a case the representatives of the deceased have no right to compel an accounting, but are only entitled to a settlement according to the terms of the agreement; and, in the absence of circumstances which would make such an arrangement fraudulent as against them, the creditors of the old firm have no preference in the assets of the old firm over the creditors of the new firm, composed of the surviving partners.<sup>61</sup>

<sup>59</sup> *Holland v. King*, 6 C. B. 727. See "Partnership," *Dec. Dig.* (Key No.) §§ 243-255; *Cent. Dig.* §§ 509-561.

<sup>60</sup> *RAND v. WRIGHT*, 141 Ind. 226, 39 N. E. 447. See "Partnership," *Dec. Dig.* (Key No.) § 255; *Cent. Dig.* § 553.

<sup>61</sup> In *re SIMPSON*, L. R. 9 Ch. App. Cas. 572. If the survivor gets the right to the firm assets under such an agreement, the executor of the deceased partner cannot, of course, be held to account for them. In *re Weir*, 59 Misc. Rep. 320, 112 N. Y. Supp. 278. See "Partnership," *Dec. Dig.* (Key No.) §§ 243-255, 298; *Cent. Dig.* §§ 509-561, 680-686.

## CHAPTER IV

### NATURE, EXTENT, AND DURATION OF PARTNERSHIP LIABILITY

- 69. Nature of Liability in Contract.
- 70. Characteristics of Joint Obligations.
- 71. Partnership Liability and Joint Liability.
- 72. Quasi Severable Character of Joint Obligations in Equity.
- 73. Liability of Estate of Deceased Partner.
- 74. Extent of Liability in Contract.
- 75. Nature and Extent of Liability in Tort.
- 76. Commencement of Partnership Liability in Contract.
- 77. Liability of an Incoming Partner.
- 78. Liability of Retiring Partner.
- 79. Termination of Partnership Liability in Contract.
- 80. Past Transactions.
- 81. Future Transactions.
- 82. Dissolution of Operation of Law.
- 83. Dissolution by Act of the Parties.

### NATURE OF LIABILITY IN CONTRACT

69. As the law does not recognize the partnership as a legal entity apart from its members, a partnership as such cannot be a party to a contract. The liabilities of a contract are the liabilities of the persons composing such relationship, and the contracts of a partnership are the contracts of the individual partners jointly. Liability in contract may be either several, joint, or joint and several. Unless modified by statute, or affected by doctrines of equity, the liability of partners with respect to partnership transactions is joint.

As stated in the black letter proposition above, since there is no entity known as a partnership, there is in the law no partnership contract apart from the contract of the persons composing the partnership. While it is customary to speak of the partnership contract, this is but a conven-

ient way of describing the contractual obligations of the partners with respect to the partnership transactions. For example, a partnership contract between A. and B., partners, on the one hand, and X., on the other, is in reality the joint contract of A. and B. with X.<sup>1</sup> By the law of contracts, a number of individuals may become obligated in different ways, viz.: Severally, jointly, or jointly and severally. The obligations of partners with respect to the partnership transactions are joint, and are in general subject to the rules governing all joint contracts. "It is true that each copartner is bound for the entire amount due on partnership contracts, and that this obligation is so far several that if he is sued alone, and does not plead the non-joinder of his copartners, a recovery may be had against him for the whole amount due upon the contract, and a joint judgment against the copartners may be enforced against the property of each. But this is a different thing from the liability which arises from a joint and several contract. There the contract contains distinct engagements, that of each contractor individually, and that of all jointly, and different remedies may be pursued upon each. The contractors may be sued separately on their several engagements, or together on their joint undertaking. But in copartnerships there is no such several liability of the copartners. The copartnerships are formed for joint purposes. The members undertake joint enterprises. They assume joint risks, and they incur in all cases joint liabilities. In all copartnership transactions this common risk and liability exists. Therefore it is that in suits upon these transactions all the copartners must be brought in, except when there is some ground of personal release from liability, as infancy or discharge in bankruptcy; and, if not brought in, the omission may be pleaded in abatement. The plea in abatement avers that the alleged promises upon which the action is brought were made jointly with an-

<sup>1</sup> HASKINS v. D'ESTE et al., 133 Mass. 356, Gilmore, Cas. Partnership, 154; HALLOWELL v. BLACKSTONE NAT. BANK, 154 Mass. 359, 28 N. E. 281, 13 L. R. A. 315, Gilmore, Cas. Partnership, 309. See "*Partnership*," *Dec. Dig. (Key No.)* §§ 165-173; *Cent. Dig.* §§ 301-305.

other, and not with the defendant alone, a plea which would be without meaning, if the copartnership contract was the several contract of each copartner."<sup>2</sup>

Contract liability is, however, in all cases joint, or joint and several, or several, according to the intention of the parties, and partners may make their contracts joint and several, or several, by express agreement to that effect.<sup>3</sup>

*Joint Obligations Distinguished from Joint and Several and Several Obligations*

Promises made by several persons may be several, joint and several, or joint; several where each promises for himself alone, joint and several where each promises for himself and for all, and joint where each promises for all. Whether a contract is several, joint and several, or joint depends upon the intentions of the parties as determined from the terms of their agreement.<sup>4</sup> As the liability of the partners is joint, and is governed by the rules applicable

<sup>2</sup> Field, J., in *MASON v. ELDRED*, 6 Wall. 231, 244, 18 L. Ed. 783, Gilmore, Cas. Partnership, 281; *Brandt v. Hall*, 40 Ind. App. 451, 82 N. E. 929; *Drew v. Bank of Monroe*, 125 La. 673, 51 South. 683. See "*Partnership*," *Dec. Dig. (Key No.)* §§ 161-173; *Cent. Dig.* §§ 301-305.

<sup>3</sup> "Joint contracts, or contracts which would be joint by the common law, are in many states declared to be construed as joint and several." 1 Stim. Am. St. Law, §§ 4113, 5014, 5015. These statutes have been held to apply to contracts made by partners. *Burgen v. Dwinal*, 11 Ark. 314; *Williams v. Muthersbaugh*, 29 Kan. 730; *Neil v. Childs*, 32 N. C. 195; *WIGGINS v. BLACKSHEAR*, 86 Tex. 665, 26 S. W. 939. But see *Currey v. Warrington*, 5 Har. (Del.) 147; *Sandusky v. Sidwell*, 173 Ill. 493, 50 N. E. 1008; *Coates v. Preston*, 105 Ill. 470; *Hyde v. Casey-Grinshaw Marble Co.*, 82 Ill. App. 83; *Pope Mfg. Co. v. Charleston Cycle Co.*, 55 S. O. 528, 33 S. E. 787. See "*Partnership*," *Dec. Dig. (Key No.)* §§ 165-173; *Cent. Dig.* §§ 301-305.

<sup>4</sup> "That rule is that a covenant will be construed to be joint or several according to the interest of the parties appearing upon the face of the deed, if the words are capable of that construction; not that it will be construed to be several by reason of several interests, if it be expressly joint." *Parke, B.*, in *Sorsbie v. Park*, 12 M. & W. 146, 158. See "*Contracts*," *Dec. Dig. (Key No.)* §§ 181-184; *Cent. Dig.* §§ 780-789; "*Covenants*," *Dec. Dig. (Key No.)* § 28; *Cent. Dig.* §§ 27, 28.

to joint contracts in general, it will be necessary to examine the characteristics of joint obligations.

### CHARACTERISTICS OF JOINT OBLIGATIONS

70. A joint obligation is one arising upon a single promise made by two or more persons jointly. Unaffected by statutory change or by doctrines of equity, the characteristics of a joint obligation are as follows:
- (a) In an action to enforce such a promise all the promisors are necessary parties.
  - (b) A release of one promisor releases all.
  - (c) A judgment upon a joint promise, whether satisfied or not, extinguishes the promise and discharges all the promisors, even though not parties to the action.
  - (d) In case of death of any promisor, the liability rests upon the surviving promisors; and, upon the death of all the promisors, upon the representative of the one dying last.

If the contract is several, there is a separate cause of action against each promisor; there are as many causes of action as there are promisors. If it is joint and several, there is a cause of action against each promisor, and one against them all jointly. Thus there is, therefore, one more cause of action than there are promisors. In the case of a joint contract there is but one promise, and hence but one cause of action—a right to proceed against all of the promisors collectively.<sup>5</sup>

<sup>5</sup> *Streichen v. Fehleisen*, 112 Iowa, 612, 84 N. W. 715, 51 L. R. A. 412; *Ripley v. Orooker*, 47 Me. 370, 74 Am. Dec. 491; *Meyer v. Estes*, 164 Mass. 457, 41 N. E. 683, 32 L. R. A. 283; *Dumanoise v. Townsend*, 80 Mich. 302, 45 N. W. 179; *Alpaugh v. Wood*, 53 N. J. Law, 638, 23 Atl. 261; *Field v. Runk*, 22 N. J. Law, 525; *Allin v. Shadburne's Ex'r*, 1 Dana (Ky.) 68, 25 Am. Dec. 121; *Slocum v. Fairchild*, 7 Hill (N. Y.) 292; *Clark v. Rawson*, 2 Denio (N. Y.) 135; *Eichbaum v. Irons*, 6 Watts & S. (Pa.) 67, 40 Am. Dec. 540; *O'Brien v. Bound*, 2 Speers (S. C.) 495, 42 Am. Dec. 384. See "*Contracts*," *Dec. Dig. (Key No.)* §§ 181-184; *Cent. Dig.* §§ 780-789.

*Actions on Joint Obligations*

Since, in a promise by two or more jointly, there is but a single promise, in which all joined, it is the right of the promisors that they all be made defendants in any action for the enforcement of such promise. If all are not made defendants, those actually sued may, by plea in abatement for nonjoinder of the others, prevent further proceedings until all are brought in. If for any reason the plaintiff is not able to make all the promisors defendants, as, for example, because one is out of the jurisdiction and cannot be served, then, if the others object, he will be unable to enforce the promise. By reason of the hardship thus incident to the enforcement of joint obligations, "in most of the states legislative acts have been passed, called 'joint debtor acts,' which, as a substitute for outlawry, provide that if process be issued against several joint debtors or partners, and served on one or more of them, and the others cannot be found, the plaintiff may proceed against those served, and, if successful, have judgment against all. Various effects and consequences are attributed to such judgments in the states in which they are rendered. They generally are held to bind the common property of the joint debtors, as well as the separate property of those served with process, when such property is situated in the state, but not the separate property of those not served; and, whilst they are binding personally on the former, they are regarded as either not personally binding at all, or only prima facie binding on the latter."\*

*Release of One Promisor*

Since there is but one cause of action in case of a joint contract, a cause of action against all of the promisors, it ordinarily follows that a discharge of one releases all. Thus, if a technical release—i. e., a release under seal—is

\* Hall et al. v. Lanning et al., 91 U. S. 160, 168, 23 L. Ed. 271, Gilmore, Cas. Partnership, 286, note; MASON v. ELDERED et al., 6 Wall. 231, 18 L. Ed. 783, Gilmore, Cas. Partnership, 281; State v. Cloudt (Tex. Civ. App.) 84 S. W. 415. See "Contracts," Dec. Dig. (Key No.) §§ 181-184; Cent. Dig. §§ 780-789; "Partnership," Dec. Dig. (Key No.) § 219; Cent. Dig. §§ 429-445.

given one joint debtor, the effect is to release all.<sup>7</sup> They agreed to be jointly liable only. Moreover, even if the release were construed as being effective as to one only, the other would, if compelled to pay, have a right to demand contribution from the released promisor, thus in effect nullifying the release.<sup>8</sup> In order to avoid the loss of the right to hold the other joint obligors by reason of a release of one, it became the practice of the creditor, instead of making a formal release, to covenant not to sue the party sought to be released, and to reserve all rights against the other joint promisors. If such was the intention of the parties, the liability of the obligors not parties to the covenant was unaffected.<sup>9</sup>

<sup>7</sup> *Brooks v. Stuart*, 9 Ad. & El. 854; *Beltzhoover v. Stockton*, 4 Cranch, C. C. 695, Fed. Cas. No. 1,283; *Armstrong v. Hayward*, 6 Cal. 186; *Haney & Campbell Mfg. Co. v. Adaza Co-operative Creamery Co.*, 108 Iowa, 313, 79 N. W. 79; *Williamson v. McGinnis*, 11 B. Mon. (Ky.) 75, 52 Am. Dec. 561; *Drinkwater v. Jordan*, 46 Me. 432; *Shaw v. Pratt*, 22 Pick. (Mass.) 305; *McAllister v. Dennin*, 27 Mo. 40; *Berry v. Gillis*, 17 N. H. 9, 43 Am. Dec. 584; *Crane v. Alling*, 15 N. J. Law, 425; *Harrison v. Close*, 2 Johns. (N. Y.) 448, 3 Am. Dec. 444; *Finch v. Simon*, 61 App. Div. 141, 70 N. Y. Supp. 361; *Greenwald v. Kaster*, 86 Pa. 47. See "Release," *Dec. Dig. (Key No.)* §§ 27-29; *Cent. Dig.* §§ 53-71.

<sup>8</sup> *North v. Wakefield*, 13 G. B. 536; *State v. Matson*, 44 Mo. 305. The rule has been changed in a number of states by statute, making a release of one joint debtor effective as to all only with respect to the proportionate share of those released. See 24 Am. & Eng. Ency. (2d Ed.) p. 305, note 4; also *NORTHERN INS. CO. v. POTTER*, 63 Cal. 157, *Gilmore, Cas. Partnership*, 286. See "Release," *Dec. Dig. (Key No.)* §§ 27-29; *Cent. Dig.* §§ 53-71; "Contribution," *Dec. Dig. (Key No.)* §§ 4, 6; *Cent. Dig.* §§ 3, 4, 10-12.

<sup>9</sup> *Lacy v. Kinaston*, 2 Salk. 575; *Dean v. Newhall*, 8 T. R. 168; *Ferson v. Sanger*, Fed. Cas. No. 4,752; *Tuthill v. Babcock*, Fed. Cas. No. 14,275; *Mullendore v. Wertz*, 75 Ind. 431, 39 Am. Rep. 155; *Williamson v. McGinnis*, 50 Ky. 75, 52 Am. Dec. 561; *Walker v. McCulloch*, 4 Me. 421; *Goodnow v. Smith*, 35 Mass. 414, 29 Am. Dec. 600; *City of Carondelet v. Desnoyer's Adm'r*, 27 Mo. 36; *Collier v. Field*, 2 Mont. 320; *Line v. Nelson*, 38 N. J. Law, 358; *Sandlin v. Ward*, 94 N. C. 490; *Gregg v. Hilsen*, 34 Leg. Int. (Pa.) 20; *Pinney v. Bugbee*, 13 Vt. 623.

"It is plain that the agreement released none of the debtors, much less all of them. Indeed, if Evans himself were sued contrary to the covenant, inasmuch as it is one of indemnity only, it is not ap-

*Judgment on a Joint Obligation*

A judgment, even though obtained against fewer than all of the persons liable on a joint contract, constitutes a bar to an action against the others. There is but one cause of action, and that cause of action is merged in the judgment obtained.<sup>10</sup> The judgment is, however, binding upon those against whom it was actually obtained. Though they had a right to object for nonjoinder of all the promisors, the right is personal to them, and if they do not raise the objection the plaintiff may proceed to judgment, which, as has just been pointed out, bars all further action on the joint promise, and discharges all the promisors, irrespective of whether they were parties or not. Statutory changes, however, in many of the states, preserve a right to proceed against the other joint obligors whenever found.<sup>11</sup>

parent how he could plead it in bar or set it up as a defence in any manner, nor why he should not be left to his action upon it for redress." *Benton v. Mullen*, 61 N. H. 123, 128.

"It is true, if the bank had formally released Reardon, she would thereby have also released Bozeman. For it is well settled that a release of one of several obligors is a discharge of all. And on this point the authorities referred to by learned counsel are conclusive. But we cannot consider the bank's agreement with Reardon a release; it is a covenant not to sue and to indemnify, which in its nature is not a release. If Reardon himself had been sued by the bank, he could not have pleaded that the bank had released him, though he might have pleaded the covenant in bar; but even that would only be permitted to avoid circuity of action." *Bozeman v. State Bank*, 7 Ark. 328, 333, 46 Am. Dec. 291.

Various statutes have been enacted in different states with respect to the effect of sealed instruments. The statutes and decisions of each jurisdiction should be consulted. See "*Release*," *Dec. Dig. (Key No.)* §§ 27-29; *Cent. Dig.* §§ 53-71.

<sup>10</sup> *King v. Hoare*, 13 M. & W. 494; *MASON v. ELDRED*, 73 U. S. 231, 18 L. Ed. 783, *Gilmore, Cas. Partnership*, 281; *Willings v. Consequa*, Fed. Cas. No. 17,767; *Taylor v. Claypool*, 5 Blackf. (Ind.) 557; *Ward v. Johnson*, 13 Mass. 148. See "*Judgment*," *Dec. Dig. (Key No.)* §§ 628, 629; *Cent. Dig.* §§ 1144, 1145.

<sup>11</sup> *MASON v. ELDRED*, 73 U. S. 231, 18 L. Ed. 783, *Gilmore, Cas. Partnership*, 281; *Bonesteel v. Todd*, 9 Mich. 371, 80 Am. Dec. 90; *Thomas v. Mohler*, 25 Md. 36; *Westheimer v. Craig*, 76 Md. 399, 23 Atl. 419; *NATHANSON v. SPITZ et al.*, 19 R. I. 70, 31 Atl. 690. See, also, post, chapter IX, pp. 543-545. See "*Judgment*," *Dec. Dig. (Key No.)* §§ 628, 629; *Cent. Dig.* §§ 1144, 1145.

*Survivorship in Joint Obligations*

Since the liability on joint contracts survives at law, it follows that, in the case of the death of one of the joint obligors, all actions on such contracts must be brought against the survivors.<sup>12</sup> In case of the successive deaths of all of the joint obligors, the legal liability on the contract accrues to the personal representative of the last survivor.<sup>13</sup>

## PARTNERSHIP LIABILITY AND JOINT LIABILITY

71. Partnership liability, as distinguished from joint liability, is a liability incurred by the partners in conducting the partnership business. Whether partnership liability and joint liability are identical is a question on which the courts differ. According to some decisions they are distinct; according to others they are identical.

*Distinction between Joint Liability and Partnership Liability*

Though partnership contracts are joint, it is possible for partners to enter into joint contracts which have no relation to the partnership business, and which are not, therefore, partnership contracts. Ordinarily it makes but little difference whether a joint contract is a partnership contract or not, until an attempt is made to prove against the partnership estate in insolvency proceedings or to reach it on execution. It then becomes important to determine whether a liability by persons in their partnership relation is any different from a joint liability of the same persons outside the partnership relation.

<sup>12</sup> *Towers v. Moore*, 2 Vern. 98; *Moore v. Rogers*, 19 Ill. 347; *Gere v. Clarke*, 6 Hill (N. Y.) 350. See "Contracts," *Dec. Dig. (Key No.)* § 182; *Cent. Dig.* §§ 780-787.

<sup>13</sup> In equity, however, a joint obligation is frequently treated as several. See section 72, *post*, on Quasi Severable Character of Joint Obligations in Equity.

*One View: Partnership Liability and Joint Liability Not Identical*

The members of a partnership have a right, as between themselves, to demand that the assets of the firm shall be applied to the payment of firm debts rather than to the separate debts of any one partner. This right can be enforced by the creditors of the partnership, and is the basis of the priority of firm creditors over separate creditors in the distribution of firm assets.<sup>14</sup> It may be, however, that all of the members of a partnership are liable on a joint obligation which has no connection with the partnership business. The question whether or not the creditors on such a joint obligation shall be entitled to proceed against the partnership property equally with the firm creditors is one of some difficulty. On the one hand, it is contended that a firm liability is distinct from a joint liability; that the assets of the firm have been built upon the firm business, and are gained in part at least through the credit extended by firm creditors, who should in consequence be given a preference over those who are joint creditors merely, and not firm creditors.<sup>15</sup>

<sup>14</sup> In re CHILDS, 9 Ch. App. 508; Murrill v. Nell, 8 How. 414, 12 L. Ed. 1135; In re Lloyd (D. C.) 22 Fed. 90; Preston v. Colby, 117 Ill. 477, 4 N. E. 375; Pahlman v. Graves, 26 Ill. 405; BUSH v. CLARK, 127 Mass. 111; Mumford v. Nicoll, 20 Johns. (N. Y.) 611; Hartman's Appeal, 107 Pa. 327; Black's Appeal, 44 Pa. 503. See "Partnership," Dec. Dig. (Key No.) §§ 165-189; Cent. Dig. §§ 301-348.

<sup>15</sup> "If a firm be composed of two persons, associated for the conduct of a particular branch of business, it can hardly be maintained that the joint contract of the two partners, made in their individual names, respecting a matter that has no connection with the firm business, creates a liability of the firm as such. The partnership is a distinct thing from the partners themselves, and it would seem that debts of the firm are different in character from other joint debts of the partners. If it is not so, the rule that sets apart the property of a partnership exclusively, in the first instance, for the payment of its debts, may be of little value. That rule presumes that a partnership debt was incurred for the benefit of the partnership, and that its property consists, in whole or in part, of what has been obtained from its creditors. The reason of the rule fails when a debt or liability has not been incurred for the firm as such,

*Another View: Partnership Liability and Joint Liability are Identical*

But it is held, on the other hand, that the right of the partner to have the firm assets applied in payment of the firm debts is an equitable doctrine, established for the benefit and protection of the partners respectively; that the partners are not injured if partnership property is taken to pay a joint debt for which all are liable. Since they are not injured, they cannot complain; and since they cannot complain, the firm creditors, who must work out their rights through the rights of the partners, likewise cannot complain.<sup>16</sup>

even though all the persons who compose the firm may be parties to the contract. Dictum of Strong, J., in *Forsyth v. Woods*, 78 U. S. 484, 486, 20 L. Ed. 207.

In *WHELAN v. SHAIN*, 115 Cal. 326, 47 Pac. 57, Gilmore, Cas. Partnership, 288, an action was brought against two partners on a note, which the court found not to be a partnership obligation, and not to have been issued as such, and certain partnership property was attached. Later the same property was attached in suit against the copartners as such on a firm obligation. Judgment being secured in both actions, the sheriff sold the property on execution, and the question arose as to whether the attachment on the joint obligation merely was prior to that on the firm obligation. It was held that partnership debts should be paid first out of the partnership property, and that the attachment on the joint obligation did not give a preference over subsequent attachments on a firm obligation.

In *Re Nims* (C. C.) 16 Blatchf. 439, Fed. Cas. No. 10,239, it was held that creditors of O. L. Nims & Co. could not prove against the estate of the firm of O. L. Nims, Agent, on the bankruptcy of the latter firm, though both firms were composed of the same persons. See *Freedman v. Holberg*, 89 Mo. App. 340, and cases cited. See "*Partnership*," *Dec. Dig.* (Key No.) §§ 165-189; *Cent. Dig.* §§ 301-348.

<sup>16</sup> In *Re Vetterlein* (D. C.) 44 Fed. 57, the court refused to separate the assets of two partnerships composed of the same persons and consolidated the claims against both firms. *CITIZENS' BANK OF PERRY v. WILLIAMS*, 128 N. Y. 77, 28 N. E. 33, 26 Am. St. Rep. 454, Gilmore, Cas. Partnership, 289; *SAUNDERS v. REILLY*, 105 N. Y. 12, 12 N. E. 170, 59 Am. Rep. 472.

In case of bankruptcy, the respective rights of joint creditors, who are not firm creditors, and of firm creditors, depend upon the provisions of the bankruptcy act involved. *Hoare v. Oriental Bank*

## QUASI SEVERABLE CHARACTER OF JOINT OBLIGATIONS IN EQUITY

72. While at law, when one of the joint obligors dies, the entire liability falls upon the survivor, in equity such liability is kept alive, and becomes a charge upon the estate of the deceased obligor. Because of this, the statement is usually made that partnership obligations are in equity joint and several.

### *Survivorship at Law*

In discussing joint tenancy and joint obligations, it was seen that survivorship was a common characteristic. The title to property held in joint tenancy went upon the death of one joint tenant to the survivor; the liability of a joint contract fell, in case of the death of one joint obligor, upon the survivor. This doctrine of survivorship, however, was

Corporation, L. R. 2 App. Cas. 589. In re Nims (C. C.) 6 Blatchf. 439, Fed. Cas. No. 10,269; Ex parte Weston, 12 Metc. (Mass.) 1.

"But appellants urge that their claim is one against both the defendants—a joint obligation—and, hence, as the equity of firm creditors is derived from the privilege of a member to see that the assets are first used to pay the firm debts for which he is liable, and as both are liable for this debt, so that neither can have any interest in preventing it from being paid out of the common property, the reason of the rule falls. If we adhere strictly to the doctrine that the firm creditors have no superior right except on that far-fetched theory, there is much reason in this contention. But it cannot be reconciled with the decisions, any more than the theory in its rigor can be. The precise point has been decided adversely to the appellant's position. *Dunnica v. Clinkscales*, 73 Mo. 500. In that case, the partnership of Morehead Bros. had made an assignment for the benefit of their creditors. Plaintiff presented, for allowance, notes given by the two members of the firm in settlement of a partnership business which they had previously conducted in the state of Iowa. It was held these notes ought not to be allowed against the assets of the new firm in Missouri. Similar rulings were made in *Forsyth v. Woods*, 78 U. S. 484 [20 L. Ed. 207]; *Page v. Carpenter*, 10 N. H. 77; *Buffum v. Seaver*, 16 N. H. 160; *Bartlett v. Meyer-Schmidt Grocer Co.* [65 Ark. 290], 45 S. W. 1063." *Goode, J., in Freedman v. Holberg*, 89 Mo. App. 340, 347. See "*Partnership*," *Dec. Dig. (Key No.)* §§ 165-190; *Cent. Dig.* §§ 301-348.

early held not to be applicable to partnership property and obligations. The maxim, "Jus accrescendi inter mercatores locum non habet," was well established.<sup>17</sup> But it is not literally true that there is no survivorship among partners. "When it is said that by the law merchant the jus accrescendi, or right of survivorship, does not take place among partners in trade, it is meant that it does not take place for the exclusive benefit of the survivor, as it does in a joint tenancy at the common law, but that the survivor holds the partnership fund for the payment of the partnership debts and the settlement of the partnership concerns, and the balance, if any, to be distributed equitably between the representatives of the deceased partner and the survivor."<sup>18</sup> The legal title to the personal property of the firm and to the choses in action goes upon the death of one partner to the survivor.<sup>19</sup> All actions growing out of the control and disposition of the personal property are brought only by or against him.<sup>20</sup> The choses in action are in law treated as joint contracts and subject to all the incidents of such contracts. The surviving partner is the only proper party in actions to enforce firm contracts, and this he may do without joining with him the representative of the deceased partner.<sup>21</sup> In an action by a surviving partner to recover a debt due the firm, he may include a debt due himself in his own right, or the defendant may set off a

<sup>17</sup> Co. Lit. 182, a.

<sup>18</sup> Walworth, C., in *Egberts v. Wood*, 3 Paige (N. Y.) 517, 526, 24 Am. Dec. 236, Gilmore, Cas. Partnership, 267, note. See "*Partnership*," Dec. Dig. (Key No.) §§ 243-258; Cent. Dig. §§ 509-598.

<sup>19</sup> See, however, chapter III, §§ 65, 66, p. 204, for a discussion of the English rule as to the legal title to the chattels of a firm.

<sup>20</sup> *Martin v. Crompe*, 1 Ld. Raym. 340; *PFEFFER v. STEINER*, 27 Mich. 537, Gilmore, Cas. Partnership, 272. See "*Partnership*," Dec. Dig. (Key No.) §§ 243-258; Cent. Dig. §§ 509-598.

<sup>21</sup> *BASSETT v. MILLER*, 39 Mich. 133, Gilmore, Cas. Partnership, 271; *STEARNS v. HOUGHTON*, 38 Vt. 584, Gilmore, Cas. Partnership, 273; *Gamble v. Rural Ind. School Dist. of Allison* (C. C.) 132 Fed. 514, 522; *Newman v. Gates*, 165 Ind. 171, 72 N. E. 638.

Even in equity the representatives of a deceased party need not be parties plaintiff in suits to collect firm debts. *BUCKLEY v. BARBER*, 6 Exch. 164. See "*Partnership*," Dec. Dig. (Key No.) §§ 243-258; Cent. Dig. §§ 509-598.

claim due him from the suing partner individually.<sup>22</sup> On the other hand, he alone can be sued on the firm liabilities. The firm debts are, as other joint debts, the debt of the collective individuals who have contracted, and no one can be held who has not promised. Therefore, if one of the joint promisors dies, the obligation remains upon the survivors only. The representatives of the deceased partner cannot be held at law on such joint obligation, because they never promised.<sup>23</sup>

*Survivorship in Equity*

Owing to the hardship which the rule of the common law frequently imposed in the case of the death of one of the co-obligors in joint obligations, equity has always shown a willingness to reform such contracts and convert them into joint and several obligations.<sup>24</sup> Even though there was no mistake justifying reformation by a court of equity, it was held very early that in equity the creditors of joint obligors might hold the representative of the deceased obligor.<sup>25</sup> Furthermore, where the survivor in a joint obligation was compelled to pay the common debt, he was allowed in equity to charge the estate of the deceased ob-

<sup>22</sup> ADAMS v. HACKETT, 27 N. H. 239, 59 Am. Dec. 376, Gilmore, Cas. Partnership, 274; Slipper v. Stidstone, 5 T. R. 493. See "Partnership," Dec. Dig. (Key No.) §§ 243-258; Cent. Dig. §§ 509-598.

<sup>23</sup> Kemp v. Andrews, Carth. 170; Dixon v. Hammond, 2 B. & Ald. 310; Martin v. Crompe, 1 Ld. Raym. 340; Slipper v. Stidstone, 5 T. R. 493; French v. Indrade, 6 T. R. 582. See "Partnership," Dec. Dig. (Key No.) §§ 243-258; Cent. Dig. §§ 509-598.

<sup>24</sup> Simpson v. Vaughan, 2 Atk. 31; GRAY v. CHISWELL, 9 Ves. 118; Pickersgill v. Lahens, 15 Wall. 140, 21 L. Ed. 119. See "Partnership," Dec. Dig. (Key No.) §§ 243-258; Cent. Dig. §§ 509-598; "Contracts," Dec. Dig. (Key No.) § 182; Cent. Dig. §§ 780-787.

<sup>25</sup> "There was a case which I determined in this court, where there were two persons jointly bound in a bond, one of the obligors died, and to be sure, at law, it might have been put in suit against the survivor, but as I thought it extremely hard, I decreed the representative of the co-obligor should be charged *pari passu* with the surviving obligor in payment of the bond." Lord Hardwicke, in Primrose v. Bromley, 1 Atk. 90. See, also, THORPE v. JACKSON, 2 Y. & C. 553, Gilmore, Cas. Partnership, 292. See "Contracts," Dec. Dig. (Key No.) § 182; Cent. Dig. §§ 780-787.

ligor to the extent he had paid more than his share.<sup>26</sup> These general principles governing joint obligations and the relief in equity from their hardships are applicable to partnership obligations. There is, indeed, additional ground for holding the representative of the deceased obligor; for, as has been seen, it is an essential part of the partnership agreement that the property of the partnership shall first be used to pay the partnership debts before any division among the partners. Obviously, therefore, the representatives of the deceased partner cannot withdraw any of the partnership assets until the common debts are paid, and equity will aid the survivor to accomplish this result. Because of the foregoing considerations it is frequently said that joint contracts are joint and several in equity, but "it has never been determined that every joint covenant is in equity to be considered as the several covenant of each of the covenantors."<sup>27</sup> "There is no doubt that in many cases and text-books we find the expression that a partnership debt is in equity joint and several. This, however, is only a compendious expression, which must be interpreted with reference to what were the functions of the court of equity as to partnership debts. The only interposition of a court of equity with regard to partnership debts took place in the administration of the assets, either of the partnership or of a deceased member of the partnership. Where a member of the partnership died, the debts became in the eye of the court at law the debts of the survivors; but the survivors, on the other hand, in a court of equity, had the right, as against the estate of a deceased partner, to say that his representatives should not withdraw any part of the partnership property until all of the debts were paid or provided for. If, therefore, a court of equity was administering the assets of a deceased partner, it would, in order to clear his estate, ascertain his liabilities to the partnership, and for

<sup>26</sup> *Musson v. May*, 3 V. & B. 194. See "*Partnership*," *Dec. Dig.* (Key No.) §§ 165-173; *Cent. Dig.* §§ 301-305.

<sup>27</sup> Sir William Grant, in *Sumner v. Powell*, 2 Mer. 30, 36; *Richardson v. Horton*, 6 Beav. 185; *United States v. Price*, 9 How. 83, 13 L. Ed. 56. See "*Partnership*," *Dec. Dig.* (Key No.) §§ 165-173, 243-258; *Cent. Dig.* §§ 301-305, 509-598.

this purpose would ascertain the debts due from the copartnership at his death. From this the other transition was easy to giving the creditors of the partnership a direct right, and not merely an indirect right, through the surviving partners, to come for payment against the assets of the deceased partner; and from this again the transition was easy to the expression which said that partnership debts, in the eye of a court of equity, were joint and several, not thereby meaning that a court of equity altered or changed a legal contract, but merely that the court, in order, before distributing assets, to administer all the equities existing with regard to them, would go behind the legal doctrine that a partnership debt survived as a claim against the surviving partners only, and would give the creditors the benefit of the equity which the surviving partners might have insisted on."<sup>28</sup> Thus it will be seen that until dissolution of a partnership by death no several liability exists in equity upon a joint contract, and if such contract should be reduced to judgment against part of the firm no liability in equity ever arises against the estate of the others.<sup>29</sup>

#### SAME—LIABILITY OF ESTATE OF DECEASED PARTNER

73. While it is well settled that the estate of the deceased partner can be made liable in equity for the partnership obligations, there is a conflict in the decisions as to when such liability can be enforced. In England and in some jurisdictions in the United States, the liability can be enforced immediately; in New York and other jurisdictions, the legal remedies against the surviving partners must be first exhausted, or a showing made that the survivors are insolvent.

<sup>28</sup> Cairns, L. C., in *KENDALL v. HAMILTON*, L. R. 4 App. Cas. 504, 516, Gilmore, Cas. Partnership, 293. See "*Partnership*," *Dec. Dig.* (Key No.) §§ 243-258; *Cent. Dig.* §§ 509-598.

<sup>29</sup> *KENDALL v. HAMILTON*, L. R. 4 App. Cas. 504, Gilmore, Cas. Partnership, 293. See "*Partnership*," *Dec. Dig.* (Key No.) §§ 165-173, 243-258; *Cent. Dig.* §§ 301-305, 509-598.

While it is well settled that the estate of the deceased partner may be made liable in equity, there is a conflict of authority as to whether the right to charge such estate arises immediately upon the death of the partner, or whether the legal remedies of the creditor against the survivors must first be exhausted or a showing be made that they are insolvent. In England the rule has been established that the estate of a deceased partner is liable in equity immediately.<sup>30</sup> They cannot, however, compete with the separate creditors of such partner.<sup>31</sup>

<sup>30</sup> The cases upon which doctrine of liability in equity of the estate of a deceased partner rests are *Primrose v. Bromley*, 1 Atk. 89; *Bishop v. Church*, 2 Ves. 371; *LANE v. WILLIAMS*, 2 Vern. 292; *Jacomb v. Harwood*, 2 Ves. Sr. 265; *Hoare v. Contencin*, Bro. C. C. 27; *GRAY v. CHISWELL*, 9 Ves. 118; *Ex parte Kendall*, 9 Ves. 118; *Devaynes v. Noble*, 1 Mer. 397; *WILKINSON v. HENDERSON*, 1 M. & K. 582. The last two cases cited established the doctrine that the creditors of the partnership might proceed immediately against the estate of the deceased.

The English rule seems formerly to have been as is now held in New York. In *VOORHIS v. CHILDS' EXECUTOR*, 17 N. Y. 354, *Gilmore, Cas. Partnership*, 298, *Selden, J.*, said: "Prior to the case of *Devaynes v. Noble*, 1 Mer. 397, the decisions of the Court of Chancery in England appear to have been, for a considerable time at least, in accordance with those in this state. The precise ground of the change seems to have been this: In the earlier cases it had been assumed that the liability in equity of the estate of the deceased partner was produced by a sort of equitable transfer to the creditor of the right of the surviving partners to insist that the estate of their deceased associate should contribute to the payment of the debts of the firm; but, upon its being afterwards held that the obligations of partners were to be regarded as joint and severable, the English courts said that in all cases of that kind creditors had a right to pursue their remedies against all or either of their debtors. They therefore held that they might proceed immediately in equity against the representatives of a deceased partner, without resorting to their legal remedies against the survivors." See "*Partnership*," *Dec. Dig. (Key No.)* §§ 247, 253; *Cent. Dig.* §§ 525, 566.

<sup>31</sup> See chapter VII, p. 457, on Remedies of Creditors. The above rule is codified in the English Partnership Act: "Every partner in a firm is liable jointly with the other partners, and in Scotland severally also, for all debts and obligations of the firm incurred while he is a partner; and after his death his estate is also severally liable in a due course of administration for such debts and obligations,

In the United States the decisions are conflicting, many jurisdictions holding with the English courts that the estate of the deceased partner may be proceeded against immediately.<sup>22</sup> On the other hand, there is much authority for the view that the estate of a deceased partner cannot be proceeded against, even in equity, unless it is shown that the surviving partners are insolvent or that the legal remedies against them have been exhausted. In New York this view has been sustained in the following language: "The surviving partners succeed primarily to all the rights and interests of the partnership. They have the entire control of the partnership property, and the sole right to collect the partnership dues. The assets of the firm are, of course, to be regarded as the primary fund for the payment of the partnership debts, and it would seem equitable, at least, that the parties having the exclusive possession of this fund should be first called upon. The answer given to this by the English courts, that the representatives of the deceased partner have their remedy over, seems hardly satisfactory. The presumption is that the primary fund is sufficient to meet the demands upon it. Why, then, permit in equity a resort to another fund, and thus give rise to a second action for its reimbursement? Besides, these English decisions, permitting the creditors to proceed in the first instance in equity against the estate of the deceased partner, are in conflict with the established doctrine

so far as they remain unsatisfied, but subject in England or Ireland to the prior payment of his separate debts." Partnership Act (1890) § 9.

<sup>22</sup> DOGGETT v. DILL, 108 Ill. 560, 48 Am. Rep. 565, Gilmore, Cas. Partnership, 300; United States v. Hughes (C. C.) 161 Fed. 1021; Nelson v. Hill, 5 How. 127, 12 L. Ed. 81; Travis v. Tartt, 8 Ala. 577; McLAIN v. CARSON'S EX'R, 4 Ark. 165, 37 Am. Dec. 777, Gilmore, Cas. Partnership, 304; Camp v. Grant, 21 Conn. 41, 54 Am. Dec. 321; Fillyau v. Laverty, 3 Fla. 72; Newman v. Gates, 165 Ind. 171, 72 N. E. 638; Freeman v. Stewart, 41 Miss. 141; Bowker v. Smith, 48 N. H. 111, 2 Am. Rep. 189; Wislam v. Lippincott, 9 N. J. Eq. 353; Saunders v. Wilder, 2 Head (Tenn.) 579; Gaut v. Reed, 24 Tex. 46, 76 Am. Dec. 94; Washburn v. Bank of Bellows Falls, 19 Vt. 278. See "Partnership," Dec. Dig. (Key No.) §§ 243-258; Cent. Dig. §§ 509-598.

that parties must first exhaust their legal remedies before resorting to courts of equity."<sup>33</sup>

Notwithstanding the fact that a judgment against less than all of the members of a partnership extinguished the claim against the others even in equity,<sup>34</sup> it has been held that a judgment recovered against the surviving members of a partnership does not preclude the judgment creditors from obtaining payment of the original debt from the estate of the deceased partner in equity.<sup>35</sup> The judgment at law is no bar, because at law the survivors only were liable. The estate of the deceased not being liable at law, there was no merger.

### EXTENT OF LIABILITY IN CONTRACT

**74. In an ordinary partnership, each partner is liable individually to the full extent of his separate estate for all the obligations of the partnership.**

**By complying, however, with statutes in some jurisdictions for the organization of limited partnership, the liability may be fixed at a certain amount.**

The law does not recognize a partnership as distinct from the individuals composing it. Hence, though the contracts of the partnership are joint, and the members, when sued, are entitled to demand that all shall be sued jointly, the contract is looked at as the contract of the members of the partnership. Each partner is liable for all the debts of

<sup>33</sup> Selden, J., in *VOORHIS v. CHILDS' EX'R*, 17 N. Y. 354, Gilmore, Cas. Partnership, 298; Pullen v. Whitfield, 55 Ga. 174; Pope v. Cole, 55 N. Y. 124, 14 Am. Rep. 198; Sherman v. Kreul, 42 Wis. 33. See "*Partnership*," *Dec. Dig. (Key No.)* §§ 243-258; *Cent. Dig.* §§ 509-598.

<sup>34</sup> *KENDALL v. HAMILTON*, 4 App. Cas. 504, Gilmore, Cas. Partnership, 293; King v. Hoare, 13 M. W. 494; *Ex parte Higgins*, 3 De G. & J. 33. See "*Partnership*," *Dec. Dig. (Key No.)* § 219; *Cent. Dig.* §§ 429-445.

<sup>35</sup> *In re Hodgson*, 31 Ch. Div. 177. See "*Partnership*," *Dec. Dig. (Key No.)* §§ 219, 220, 243-258; *Cent. Dig.* §§ 429-469, 509-598.

the partnership.<sup>36</sup> "The contract, when made with partners, is originally a joint contract, but may be separate as to its effects. Though all are sued jointly, and a joint execution taken out, yet it may be executed against one only."<sup>37</sup> An execution may be levied against the assets of the partnership, or against the assets of any member of the partnership. If levied against the assets of a single partner, the entire demand may be satisfied out of such assets at the will of the creditor, leaving all questions of contribution to be settled among the members of the partnership themselves. Even though there be an agreement between the partners that one shall not be liable beyond a certain amount for partnership debts, the rights of firm creditors to go against such partner, for the full amount of the firm debts will not be affected thereby.<sup>38</sup> The only effectual way that a partner can escape the unlimited liability of the common law, without legislative assistance, is by contracting with the creditor, at the time that the contract is made, that such creditor shall satisfy his claim out of the partnership funds. Such an arrangement, while possible, would be unusual.<sup>39</sup> Under legislative authority, however, a partner may limit his liability by complying with the statutes providing for the organization of limited partnerships.<sup>40</sup>

<sup>36</sup> HALLOWELL v. BLACKSTONE NAT. BANK, 154 Mass. 359, 28 N. E. 281, 13 L. R. A. 315, Gilmore, Cas. Partnership, 309; Christian v. Illinois Malleable Iron Co., 92 Ill. App. 320; Benchley v. Chapin, 10 Cush. (Mass.) 173; Nebraska Ry. Co. v. Lett, 8 Neb. 251; Allen v. Owens, 2 Speers (S. C.) 170. See "Partnership," Dec. Dig. (Key No.) §§ 165-173; Cent. Dig. §§ 301-305.

<sup>37</sup> De Grey, C. J., in Abbot v. Smith, 2 W. Blackstone, 947, 949. See "Partnership," Dec. Dig. (Key No.) §§ 165-173, 219, 220; Cent. Dig. §§ 301-305, 429-469.

<sup>38</sup> MAGILTON v. STEVENSON et al., 173 Pa. 560, 34 Atl. 235, Gilmore, Cas. Partnership, 445; Dean v. Phillips, 17 Ind. 406. See "Partnership," Dec. Dig. (Key No.) §§ 165-173, 176-190, 219, 220; Cent. Dig. §§ 301-305, 308-348, 429-469.

<sup>39</sup> Lindley's Law of Partnership (7th Ed.) p. 229.

<sup>40</sup> See chapter XI, p. 592, Limited Partnerships.

## NATURE AND EXTENT OF LIABILITY IN TORT

75. For all torts committed in the course of the partnership business each partner is liable, and this liability is joint and several.

### *Tort Liability Joint and Several*

Though the contract liability of partners is joint only, their liability for torts is joint and several. The reason for this difference is that in the case of contract liability regard is had to the intention of the parties; in the case of tort liability the liability is imposed by law with especial regard to the rights of the injured person. Hence an action for a tort may be brought against any or all of the partners liable, and those against whom the action is brought cannot plead in abatement that the rest are not joined.<sup>41</sup> Thus, where an action was brought against several partners, whose servant, in command of a ship owned by them, had negligently caused his ship to run into another ship, upon which were the plaintiff's goods, thereby causing damage to such goods, it was held that those partners who were sued could not complain that others were not joined.<sup>42</sup> But if the cause of action is founded upon contract, and cannot be maintained without reference to such contract, all the partners must be joined, even though the action itself sounds in tort.<sup>43</sup> If, however, an action is prosecuted to

<sup>41</sup> *WHITE v. SMITH*, 12 Rich. Law (S. C.) 595, Gilmore, Cas. Partnership, 306; *Roberts v. Johnson*, 58 N. Y. 613; *Hoxie v. Farmers' & Mechanics' Nat. Bank*, 20 Tex. Civ. App. 462, 49 S. W. 637; *Grissom v. Hofius*, 39 Wash. 51, 80 Pac. 1002. See "Partnership," *Dec. Dig. (Key No.)* §§ 153, 174; *Cent. Dig.* §§ 274-277, 306.

<sup>42</sup> *Mitchell v. Tarbutt*, 5 T. R. 649. See "Partnership," *Dec. Dig. (Key No.)* §§ 153, 174, 200; *Cent. Dig.* §§ 274-277, 306, 369-371.

<sup>43</sup> "The principle running through all the cases seems to be that where the action is maintainable for the tort simply, without reference to any contract between the parties, the action is one of tort purely, although the existence of a contract may have been the occasion or furnished the opportunity for committing the tort. But where the action is not maintainable without pleading and proving the contract—where the gist of the action is the breach of the contract, either by malfeasance or nonfeasance—it is, in substance,

judgment against some of several joint tort-feasors, such a judgment is held, in England, to be a bar to a subsequent action against the others, even though it remains unsatisfied.<sup>44</sup> In this country it is generally held that an unsatisfied judgment against one or more of several joint tort-feasors is no bar to a subsequent action against the others.<sup>45</sup> The liability of a firm for the torts of one member, is co-extensive with that of the partner who actually committed the tort.<sup>46</sup>

*Liability for Tort Committed in the Course of Business*

It has been said that "the law as to partnership is undoubtedly a branch of the law of principal and agent."<sup>47</sup> Whether this is so or not, it is undoubtedly true that the law of partnership and the law of agency are intimately connected; for "every partner is an agent of the partnership, and his rights, powers, duties, and obligations are in many respects governed by the same rules and principles as those of an agent. A partner virtually embraces the character of both a principal and an agent."<sup>48</sup> This being true, we find that the liability of the partnership for the

whatever may be the form of the pleading, an action on the contract, and hence all persons jointly liable must be sued." Mitchell, J., in *Whittaker v. Collins*, 34 Minn. 290, 25 N. W. 632, 57 Am. Rep. 55; citing *Powell v. Layton*, 2 Bos. & Pul. 385; *Max v. Roberts*, 2 Bos. & Pul. 454; *Cabell v. Vaughan*, 1 Wms. Saund. 288h, 291e, 291f; *Weall v. King*, 12 East, 452; *Bretherton v. Wood*, 3 Brod. & B. 54; *Walcott v. Canfield*, 3 Conn. 194. See "*Partnership*," *Dec. Dig. (Key No.)* §§ 153, 174, 200; *Cent. Dig.* §§ 274-277, 306, 369-371.

<sup>44</sup> *Brinsmead v. Harrison*, L. R. 7 C. P. 547. See "*Judgment*," *Dec. Dig. (Key No.)* §§ 629-631; *Cent. Dig.* §§ 1064, 1088, 1144-1146.

<sup>45</sup> *Lovejoy v. Murray*, 3 Wall. 1, 18 L. Ed. 129.

As the rules governing the liability of joint tort-feasors who are partners are the same as govern joint tort-feasors generally, a full discussion of this subject belongs more properly to a work on torts. For such a discussion, see Cooley, *Torts* (3d Ed.) pp. 231-238. See "*Judgment*," *Dec. Dig. (Key No.)* §§ 629-631; *Cent. Dig.* §§ 1064, 1088, 1144-1146.

<sup>46</sup> *Heirn v. McCaughan*, 32 Miss. 17, 60 Am. Dec. 588. See "*Partnership*," *Dec. Dig. (Key No.)* §§ 153, 174; *Cent. Dig.* §§ 274-277, 306.

<sup>47</sup> Lord Wensleydale, in *COX v. HICKMAN*, 8 H. L. C. 288, Gilmore, *Cas. Partnership*, 81. See "*Partnership*," *Dec. Dig. (Key No.)* § 125; *Cent. Dig.* § 190.

<sup>48</sup> Story on *Partnership*, section 1.

torts of each partner is determined by the law of agency. It is the liability which a principal has for the torts of his agent. It is well established in the law of agency that the principal is liable for the authorized torts of his agent, and, further, that he is liable for torts which he commits in the course of the business of the principal, even though the principal may not have expressly authorized the act complained of, or even though he had expressly forbidden it.<sup>49</sup>

The test, then, of the liability of a partnership, or rather of the members of a partnership, for the tort of one partner, is: Was it committed in carrying on the firm business?<sup>50</sup> Thus, if one member of a publishing partnership should put a libel in the partnership paper to be given out as news, all of the partners would be liable. The business of the firm being the publishing of news, the partner has the implied authority to publish the libel as news. Such news being libelous, all of the partners are liable.<sup>51</sup> But if one partner in a mercantile or other business maliciously tells untruths about a third party, which constitute a libel, but which are not told in furtherance of the firm business, the others are not liable. This is not because of the fact that the libel was told maliciously, but because it was outside of the firm business. Thus, where a table was returned to A., B., C. & D., trading as a furniture company, and a placard was placed upon it saying: "Taken back from Dr. N., who would not pay for it. To be sold at a bargain. Moral: Beware of deadbeats"—it was held that the utterance of the libel was not shown to be sufficiently connected with the firm business to make any partner liable, in the absence of a showing of knowledge or authority on his part.<sup>52</sup>

<sup>49</sup> *Collman v. Mills*, 1 Q. B. 396. See "*Partnership*," *Dec. Dig.* (Key No.) §§ 153, 174; *Cent. Dig.* §§ 274-277, 306.

<sup>50</sup> *Haase v. Morton & Morton*, 138 Iowa, 205, 115 N. W. 921. See "*Partnership*," *Dec. Dig.* (Key No.) §§ 153, 174; *Cent. Dig.* §§ 274-277, 306.

<sup>51</sup> *Lothrop v. Adams*, 133 Mass. 471, 43 Am. Rep. 528. See "*Partnership*," *Dec. Dig.* (Key No.) §§ 153, 174; *Cent. Dig.* §§ 274-277, 306.

<sup>52</sup> *Woodling v. Knickerbocker*, 31 Minn. 268, 17 N. W. 387. Still, if the libel is told in aid of the business through injury to a com-

Other instances of acts which have been held to be within the scope of the business and for which the partners generally have been held liable are: Where in the prosecution of the business one member of a firm of butchers negligently left meat where it was eaten by a dog, who died from the effects of it;<sup>53</sup> where one member of a firm which held a chattel mortgage on certain goods, the owner of which was in default, entered the mortgagor's premises by force, forcibly took possession of the mortgaged property, and in doing so committed an assault upon the mortgagor;<sup>54</sup> where one of several partners drove a partnership coach negligently, thereby injuring a third person;<sup>55</sup> where one of a firm of solicitors gave negligent advice to a client.<sup>56</sup>

On the other hand, it has been held that a partner was not liable where his partner converted property to his own use;<sup>57</sup> nor where he, without advice or consent, instituted malicious prosecution for larceny of firm property.<sup>58</sup> The acts in question could not be said to have been committed in furtherance of the firm business, and were not within the implied authority of a partner.<sup>59</sup>

petitor, all the members, even of a trading company, may be liable. *HANEY MFG. CO. v. PERKINS*, 78 Mich 1, 43 N. W. 1073, Gilmore, Cas. Partnership, 396. See "Partnership," *Dec. Dig. (Key No.)* §§ 153, 174; *Cent. Dig.* §§ 274, 306.

<sup>53</sup> *Dudley v. Love*, 60 Mo. App. 420. See "Partnership," *Dec. Dig. (Key No.)* §§ 153, 174; *Cent. Dig.* §§ 274-277, 306.

<sup>54</sup> *Titcomb v. James*, 57 Ill. App. 296. See "Partnership," *Dec. Dig. (Key No.)* § 153; *Cent. Dig.* § 274.

<sup>55</sup> *Moreton v. Hardern*, 4 B. & C. 223. See "Partnership," *Dec. Dig. (Key No.)* § 153; *Cent. Dig.* § 274.

<sup>56</sup> *Blyth v. Fladgate*, [1891] 1 Ch. 337; *Morgan v. Blyth*, [1891] 1 Ch. 354; *Smith v. Blyth*, [1891] 1 Ch. 337. See "Attorney and Client," *Dec. Dig. (Key No.)* § 115; *Cent. Dig.* § 231.

<sup>57</sup> *Townsend v. Hagar*, 72 Fed. 949, 19 C. C. A. 256; *Stokes v. Burney*, 3 Tex. Civ. App. 219, 22 S. W. 126. See "Partnership," *Dec. Dig. (Key No.)* §§ 153, 174; *Cent. Dig.* §§ 274-277, 306.

<sup>58</sup> *Marks v. Hastings*, 101 Ala. 165, 13 South. 297; *Farrell v. Friedlander*, 63 Hun, 254, 18 N. Y. Supp. 215. See "Malicious Prosecution," *Dec. Dig. (Key No.)* § 42; "Partnership," *Cent. Dig.* § 274.

<sup>59</sup> For further discussion of the power of a partner to subject his copartner to liability in tort, see chapter V, Powers of Partners.

## COMMENCEMENT OF PARTNERSHIP LIABILITY IN CONTRACT

76. While two or more persons who are not partners may become liable on a joint contract, the joint liability of partners arises only when the relation of partnership has been duly established and the resulting mutual agency necessary to enable one partner to bind his copartners has commenced.

It is quite possible for two or more persons who are not partners to make themselves liable on a joint contract, either because they both immediately entered into such contract, or because one was authorized to make such a contract for the others. In the latter alternative it is a question of fact whether there was authority in one to bind the others. Such authority must be established in the manner pertaining to ordinary agency. The joint liability of partners, however, can arise only when the partnership relation has been duly established. The power of one partner to bind his copartner by acts done within the scope of the business results from the mutual agency implied from the very formation of the relation. Until such relation is formed, therefore, no agency exists, and consequently no power to create partnership liability.<sup>60</sup>

The agency of each partner commencing with the partnership, and not before, it follows that the firm is not liable for what may be done by any partner before he becomes a member thereof. So that, if several persons agree to become partners, and to contribute each a certain amount of money or goods for the joint benefit of all, each one is solely responsible to those who may have supplied him with the money or goods to be contributed by him;<sup>61</sup> and the fact

<sup>60</sup> See chapter V, p. 273. Powers of Partners.

<sup>61</sup> *Kirby v. McDonald*, 70 Fed. 139, 17 C. C. A. 26; *National Bank of Virginia v. Cringan*, 91 Va. 347, 21 S. E. 820. See "Partnership," *Dec. Dig. (Key No.)* §§ 125-164; *Cent. Dig.* §§ 190-300.

that the money or goods so supplied have been brought in by him as agreed will not render his copartners liable.<sup>62</sup>

It may very well be that those who contemplate a partnership may authorize each other to perform certain acts preparatory to the launching of the enterprise. In such a case all will be liable for the acts of the others by the general rules of agency. In order, however, to hold them, it must be shown that such authority was actually given. Of course, those who contemplate a future partnership may contrary to their expectations make a present partnership. If it can be proved that they have in fact formed a partnership, a partnership liability can then be imposed upon them. But, except in cases of estoppel, only those can be held as partners who were actually partners at the time the liability accrued.

If persons agree to become partners as from a future day, upon terms to be embodied in articles of partnership to be executed on that day, and the articles are not then executed, but they nevertheless immediately commence their business as partners, they will all be liable for the acts of each, whether those acts occurred before or after signing of the articles; for the question in such a case is not when the articles were signed, but rather when did the partners commence business. The mutual agency begins from that time, whether they choose to execute any partnership articles or not. Where there is an agreement for a partnership, and there is nothing to lead to the conclusion that the partnership was intended to commence at any other time, it will be held to commence at the date of the articles, unless in fact it began at some other time.<sup>63</sup>

<sup>62</sup> Brooke v. Evans, 5 Watts (Pa.) 196; Heap v. Dobson, 15 C. B. (N. S.) 460. See "Partnership," *Dec. Dig. (Key No.)* § 135; *Cent. Dig.* § 202.

<sup>63</sup> Williams v. Jones, 5 Barn. & C. 108. See "Partnership," *Dec. Dig. (Key No.)* §§ 57, 58; *Cent. Dig.* §§ 82, 83.

**SAME—LIABILITY OF AN INCOMING PARTNER**

77. As one partner's liability for the acts done by his copartners exists by virtue of the mutual agency necessarily incident to the partnership relation, it follows that until such relation is established there can be no liability. Therefore an incoming partner is not liable for the obligations which arose before he became a member of the firm.

He may, however, make himself liable by assuming responsibility for a part or all of the existing obligations. This assumption may take the form of:

- (1) Novation.
- (2) Agreement to be joint obligor, surety, or guarantor.
- (3) A promise to his prospective copartners for the benefit of the holders of such existing obligations.

***In General***

While it is customary to speak of a person as being admitted into a firm, and to describe him as an incoming partner, what really takes place is the formation of a new partnership, composed of the persons previously engaged in business and the additional person. Whatever liabilities there may be existing against the members of the original firm remain their personal liabilities. The new member does not join the old firm, and consequently does not become liable for the debts of the former partners. He becomes a partner for the future; he has no part in what is past, and incurs no liability in respect to it.<sup>64</sup> It cannot be said that the entering into the firm constitutes a ratification of what has already been done, because such was not in any probability the intention of the incoming partner. Besides, the liability of the old firm was not incurred on

<sup>64</sup> *Mellor v. Lawyer*, 55 Ill. App. 679; *Humes v. Higman*, 145 Ala. 215, 40 South. 128; *Bank of Commerce v. Ada, County Abstract Co.*, 11 Idaho, 756, 85 Pac. 919; *Strickler v. Gitchee*, 14 Okl. 523, 78 Pac. 94. See "*Partnership*," *Dec. Dig. (Key No.)* § 238; *Cent. Dig.* §§ 491-493.

behalf of the new partner, and one cannot ratify that which was not done on his behalf.<sup>65</sup>

*Assumption of Liability by Incoming Partner*

While an incoming partner is not liable for the existing obligations of a firm of which he becomes a member, he may nevertheless make himself liable. This may be done by assuming responsibility for a part or all of the existing obligations. The assumption of liability may take the form of a novation, of an agreement to become a joint obligor with the old partners, or a surety or guarantor of the existing debts, or of a promise to his prospective copartners to pay such obligations, which promise may inure to the benefit of the creditors of the old firm. In order to explain the nature and scope of this assumed liability, it will be necessary to recur briefly to certain elementary and fundamental doctrines of the law of contracts.

A contract is the result of an agreement between certain persons, who for a consideration undertake to act or refrain from acting in a designated manner. The obligations of the contract rest upon those only who have promised to be bound. They are the parties to the contract. They only can enforce its obligations or be held on its undertakings. While the performance of the stipulations of a contract may result in benefit to a third person, such person does not by that fact become a party to the contract. Any doctrine, therefore, which recognizes a right in a person not a party to a contract to enforce its performance, is, in the eyes of a court of law, anomalous. At common law the rule was well established that only the parties to the contract could bring an action to enforce it.<sup>66</sup>

Where a partnership is in existence and has incurred debts, these obligations rest upon contracts between the creditor on the one hand and the members composing the partnership on the other. The rights and liabilities of the

<sup>65</sup> *Wilson v. Tumman*, 6 Man. & G. 236; *HUGHES v. GROSS*, 166 Mass. 61, 43 N. E. 1031, 32 L. R. A. 620, 55 Am. St. Rep. 375. See "Partnership," *Dec. Dig. (Key No.)* § 238; *Cent. Dig.* §§ 491-493.

<sup>66</sup> *Wald's Pollock on Contracts* (3d Ed.) p. 233.

parties are to be determined by the terms of the contracts. If a stranger is admitted to a partnership after debts have arisen, he is clearly not bound by these debts, because he is not a party to the contracts. In order, therefore, to render an incoming partner liable on existing obligations, a new contract must be made. The form of this agreement will determine the nature of his liability. He may, in consideration of being thus admitted or for some other consideration, agree to pay a part or all of the existing debts of the firm, or he may agree to be liable with the original partners for the old debts, or agree to act as surety or guarantor with respect to those.

*Same—Novation—As Affecting Incoming Partner*

While the obligations of a contract pertain only to those who are parties to it, and a contract once made cannot be changed or abandoned, except all who originally joined in it consent, it is well established that, if the original parties do come together, they may, upon a consideration, rescind the old contract, or make a new contract differing in terms or parties. Where the new agreement has for its object a change of parties, it will, when consummated, constitute a novation. For example, where A. is indebted to M., and X. promises M., in consideration of A.'s release by M., to pay A.'s debt to M., M. may now hold X., not on the old promise of A., but on the new promise of X. As novation is a substitution of parties in a contract, it is obvious that it may be used to create a liability against an incoming partner or to relieve an outgoing partner from an existing obligation by substituting some one in his place. Novation, therefore, in this section, is discussed in connection with the liability of an incoming partner, and also in a later section in connection with the liability of a retiring partner.

An incoming partner may become a party to a novation whereby the existing obligations resting upon the original members of the firm are, by a valid contract with the firm creditors, transferred to him, and the original members are released. But such a substitution of debtors must be made in compliance with the well-established rules governing novations in general. The agreement giving rise to the nova-

tion may be either express or implied.<sup>67</sup> "The rule stands on the principle of assent by the party to be charged, and consent of the creditor to accept the new liability."<sup>68</sup> "There must be a novation before the new firm is liable; and the new contract must receive the consent of all the parties, and must have the effect to extinguish the old contract, and create a new liability of debtor and creditor, or of contractors, between the creditor or contractor and the new firm, and such new contract must be based on some consideration."<sup>69</sup>

*Same—Assumption as Joint Obligor, Surety, or Guarantor*

The agreement between the incoming partner and the original members of the firm may not, however, constitute a novation. It may provide that the incoming partner will become jointly liable with the old partners, or be a surety for them, or a guarantor. It is always a question to be determined by the facts of each particular case as to what was the incoming partner's agreement. Having determined this, his liability will be governed by the rules of law ap-

<sup>67</sup> *Rolfe v. Flower*, L. R. 1 P. C. 27; *Regester v. Dodge* (C. C.) 6 Fed. 9; *Venable v. Stevens*, 94 Ga. 281, 21 S. E. 516; *Hellman v. Schwartz*, 44 Ill. App. 84; *Rusk v. Gray*, 83 Ind. 589; *Hoopes v. McCan*, 19 La. Ann. 201; *Consalus v. McConihe*, 119 N. Y. 652, 23 N. E. 1150; *Earon v. Mackey*, 106 Pa. 452; *Frye & Bruhn v. Phillips*, 46 Wash. 190, 89 Pac. 559. See "*Partnership*," *Dec. Dig. (Key No.)* § 239; *Cent. Dig.* §§ 487, 488, 495-499.

<sup>68</sup> *Shoemaker Piano Mfg. Co. v. Bernard*, 2 Lea (Tenn.) 358, *Gilmore, Cas. Partnership*, 328, note. See "*Partnership*," *Dec. Dig. (Key No.)* §§ 238, 239; *Cent. Dig.* §§ 487, 488, 491-493, 495-499.

<sup>69</sup> *Parmalee v. Wiggenhorn*, 6 Neb. 322, *Gilmore, Cas. Partnership*, 328, note.

"It is indisputable that an incoming partner is not, as of course, liable for the debts and transactions of the firm, and that he can be made liable in an action at law by the creditor only by some agreement on his part to assume such liability. The mere fact that he becomes a member of the firm creates no presumption of the existence of such agreement. The fact, however, may be established by indirect as well as by direct evidence, and may, in the absence of an express agreement, be inferred from facts and circumstances which justly raise an implication of its existence." *Andrews, J.*, in *Peyser v. Myers*, 135 N. Y. 599, 602, 32 N. E. 699. See "*Partnership*," *Dec. Dig. (Key No.)* §§ 238, 239; *Cent. Dig.* §§ 487, 488, 491-493, 495-499.

plicable to such situations generally. On principle, the firm creditor should be a party to any contract by which an incoming partner agrees to become a joint obligor with respect to existing firm debts, or to be liable as surety or guarantor thereon. Whether he is a necessary party to such an arrangement is not entirely clear from the cases. As, for example, where one was taken into an existing partnership having debts, the court said in a Wisconsin case: "It is settled law in this state, as in many others, that when an incoming partner, in consideration of being received into the firm and becoming part owner of the firm property, agrees to assume with the old partner or partners the existing debts of the business, such agreement is valid and binding, though it be by parol, and that such promise is enforceable by the creditors whose debts are thus assumed." As to whether the firm creditor must be a party to the arrangement the court says: "It is probably true that acceptance by the creditor is necessary to make the assumption a complete contract as between the firm and the creditor."<sup>10</sup>

*Same—Promise for the Benefit of Third Person*

It may very well be, however, that the arrangement whereby an incoming partner is admitted to an existing firm will not take the form of a novation or make him a joint obligor or guarantor. The agreement which is more likely to be made is this: The incoming partner will promise the original members of the firm that in consideration of his being admitted he will pay the existing debts of the firm. This promise will run, however, to the original members, and not to the firm creditors; and therein it differs essentially from a novation, where the promise which effects a substitution of debtors always runs to the creditor. The promise will create a valid contract between the incoming partner and his prospective associates. The question will at once arise: How can the creditor of the original firm

<sup>10</sup> Winslow, J., in *J. & H. Clasgens Co. v. Silber*, 93 Wis. 579, 585, 87 N. W. 1122, 1124; *Holle v. Bailey*, 58 Wis. 434, 17 N. W. 322; *Coleman v. Lansing*, 65 Barb. (N. Y.) 54. See "*Partnership*," *Dec. Dig. (Key No.)* §§ 238, 239; *Cent. Dig.* §§ 487, 488, 491-493, 495-499.

take advantage of such promise? Clearly according to the law of contracts he ought not to be able to bring an action at law to enforce it. While the performance of the promise will result beneficially to him, in that he will get his claim against the old firm paid, still this does not make him a party to the contract. The promise was not to him, and he gave no consideration for it. At law, therefore, he should have no remedy upon it.

The English courts hold, consistently with the theory of contracts, that privity of contract is necessary in order to enforce a contract; one who is merely a beneficiary under the contract of other persons has not such privity, and cannot, therefore, enforce the promise.<sup>71</sup> The same rule is applied in a number of the state courts in this country.<sup>72</sup>

In equity, however, it is entirely proper to afford the firm creditors a remedy. When the incoming partner enters into a binding agreement with the original partners to pay the firm debts, he is clearly liable to them for the nonperformance of his promise. This right of the original partners against the incoming partner is an asset in their hands. Assuming that the incoming partner is solvent, and that an action against him will be effective to compel the performance of his contract or respond in damages, the creditors of the original firm may properly claim to be subrogated to this right of the original partners against the incoming partner, and a court of equity will recognize the right and enforce it.<sup>73</sup>

<sup>71</sup> Price v. Easton, 4 B. & Ad. 433. See "Partnership," Dec. Dig. (Key No.) §§ 238, 239; Cent. Dig. §§ 487, 488, 491-493, 495-499; "Contracts," Dec. Dig. (Key No.) §§ 186, 187; Cent. Dig. §§ 790-807.

<sup>72</sup> Borden v. Boardman, 157, Mass. 410, 32 N. E. 469; Exchange Bank of St. Louis v. Rice, 107 Mass. 37, 9 Am. Rep. 1; Linneman v. Moross' Estate, 98 Mich. 178, 57 N. W. 103, 39 Am. St. Rep. 528. See "Partnership," Dec. Dig. (Key No.) §§ 238, 239; Cent. Dig. §§ 487, 488, 491-493, 495-499; "Contracts," Dec. Dig. (Key No.) §§ 186, 187; Cent. Dig. §§ 790-807.

<sup>73</sup> Keller v. Ashford, 133 U. S. 610, 10 Sup. Ct. 494, 33 L. Ed. 667; Union Mutual Life Insurance Co. v. Hanford, 143 U. S. 187, 12 Sup. Ct. 437, 36 L. Ed. 118. Youngs v. Trustees for Support of Public Schools, 31 N. J. Eq. 290. See "Partnership," Dec. Dig. (Key No.) §§ 238, 239; Cent. Dig. §§ 487, 488, 491-493, 495-499.

*Same—Anomalous Doctrine at Law*

While it is inconsistent on principle with the law of contracts to permit the firm creditors to enforce the promise of the incoming partner, running to the original partners, to pay the existing firm debts, it must be recognized that in very many jurisdictions in the United States it is well settled that the firm creditors may bring an action at law directly to enforce such promise.<sup>14</sup> The cases proceed upon the doctrine of the law of contracts that a person for whose benefit a promise is made should be permitted to enforce such promise immediately. Thus, where A. is indebted to M., and X. promises A. for a consideration to pay this debt, M. may enforce X.'s promise, although it was not made to him and he gave no consideration for it. What really takes place is that A. holds the promise of X. as a chose in action in trust for M., the beneficiary. The law executes the trust by permitting the beneficiary to proceed directly to reduce the chose to possession. The doctrine of *Lawrence v. Fox* and similar cases in contract is applicable to partnership contracts, so that the firm creditors may enforce directly the promise of the incoming partner made for their benefit.<sup>15</sup> It is a very general qualification of the rule, however, that only in case the performance of the contract by

<sup>14</sup> *Lawrence v. Fox*, 20 N. Y. 268; *Hendrick v. Lindsay*, 93 U. S. 143, 23 L. Ed. 855; *Mason v. Hall*, 30 Ala. 601; *Morgan v. Overman Silver Min. Co.*, 67 Cal. 537; *Lehow v. Simonton*, 3 Colo. 346; *Treat v. Stanton*, 14 Conn. 454; *Bristow v. Lane*, 21 Ill. 194; *Stevens v. Flannagan*, 131 Ind. 122, 30 N. E. 898; *West v. Western Union Tel. Co.*, 39 Kan. 93, 17 Pac. 807, 7 Am. St. Rep. 530; *Bohanan v. Pope*, 42 Me. 96; *Dearborn v. Parks*, 5 Me. 81, 17 Am. Dec. 206; *Vrooman v. Turner*, 69 N. Y. 230, 25 Am. Rep. 195; *Bellas v. Fagely*, 19 Pa. 276; *Hind v. Holdship*, 2 Watts (Pa.) 104, 26 Am. Dec. 107; *Brown v. O'Brien*, 1 Rich. Law (S. C.) 268, 44 Am. Dec. 254; *Grant v. Diebold Safe Co.*, 77 Wis. 72, 45 N. W. 951; *Tweeddale v. Tweeddale*, 116 Wis. 517, 93 N. W. 440, 61 L. R. A. 509, 96 Am. St. Rep. 1003. See "*Partnership*," *Dec. Dig. (Key No.)* §§ 238, 239; *Cent. Dig.* §§ 487, 488, 491-493, 495-499.

<sup>15</sup> *Lehow v. Simonton*, 3 Colo. 346; *Poole v. Hintrager*, 60 Iowa, 180, 14 N. W. 223; *Reynolds v. Lawton*, 62 Hun, 596, 17 N. Y. Supp. 432. See "*Partnership*," *Dec. Dig. (Key No.)* §§ 238, 239; *Cent. Dig.* §§ 487, 488, 491-493, 495-499.

the promisor relieves the promisee from a legal obligation to the beneficiary can the beneficiary enforce the contract.<sup>76</sup>

In a leading New York case the distinction was made that if the agreement was to assume only a certain proportion of the debts of the firm the agreement could not be taken advantage of by the firm creditors. The contract might be fulfilled by paying certain creditors to the exclusion of others; hence no one creditor could show that such a contract was for his benefit.<sup>77</sup> But the same court has held that where the contract was to pay specific debts those to whom such debts were owed could take advantage of the contract;<sup>78</sup> and where a third person agreed to pay all of the debts of a firm it was held that the creditors of the firm generally could hold him on his promise.<sup>79</sup>

#### SAME—LIABILITY OF RETIRING PARTNER

78. A partner who retires from a firm continues liable on all obligations created while he was a member of the partnership, unless there has been a termination of partnership liability in one of the methods designated in the preceding section 70 or section 80, or unless there has been a novation.

**MODIFIED LIABILITY:** In some jurisdictions, however, it is held that where a partner retires, and the continuing partners take the firm assets

<sup>76</sup> *Barnes v. Hekla Fire Ins. Co.*, 56 Minn. 38, 57 N. W. 314, 45 Am. St. Rep. 438; *Jefferson v. Asch*, 53 Minn. 446, 55 N. W. 604, 23 L. R. A. 257, 39 Am. St. Rep. 618; *Lawrence v. Fox*, 20 N. Y. 268; *Coleman v. Whitney*, 62 Vt. 123, 20 Atl. 322, 9 L. R. A. 517. See "Partnership," *Dec. Dig. (Key No.)* §§ 238, 239; *Cent. Dig.* §§ 487, 488, 491-493, 495-499.

<sup>77</sup> *Wheat v. Rice*, 97 N. Y. 296; *Serviss v. McDonnell*, 107 N. Y. 260, 14 N. E. 314. See "Partnership," *Dec. Dig. (Key No.)* §§ 238, 239; *Cent. Dig.* §§ 487, 488, 491-493, 495-499.

<sup>78</sup> *ARNOLD v. NICHOLS*, 64 N. Y. 117, *Gilmore, Cas. Partnership*, 328. See "Partnership," *Dec. Dig. (Key No.)* §§ 238, 239; *Cent. Dig.* §§ 487, 488, 491-493, 495-499.

<sup>79</sup> *Barlow v. Myers*, 64 N. Y. 41, 21 Am. Rep. 582. See "Partnership," *Dec. Dig. (Key No.)* §§ 238, 239; *Cent. Dig.* §§ 487, 488, 491-493, 495-499; "Contracts," *Cent. Dig.* § 800.

and assume to pay the existing firm debts, the retiring partner ceases to be primarily liable and becomes a surety merely for such debts. All firm creditors who have notice of such an arrangement are bound to treat him as a surety, and any conduct by the creditor that will discharge an ordinary surety will discharge the retiring partner.

*Novation—Release of Retiring Partner*

It will not be necessary to examine specially the termination of a partner's liability by payment, release, and merger. This has already been sufficiently discussed under sections 70 and 80. Novation as a means of creating a liability against an incoming partner has also been considered under the foregoing section. It remains to notice, however, the application of the rules governing novation as affecting the liability of a retiring partner. As an incoming partner was not liable on the debts of the firm incurred previous to his admission, because he was not a party to the contract giving rise to such debts, so a retiring partner cannot escape liability on the debts incurred while he was a member of the firm because he is a party to the contract giving rise to them. When a party incurs a contract liability, he cannot, without the consent of the other party to the contract, escape such liability.

It is quite usual, when a person who has been a member of a partnership retires from such relation, for his copartner or copartners to continue the business and to agree with the retiring partner to pay the outstanding debts. It is obvious that such an arrangement between the retiring and continuing partners, without the consent of the firm creditors, can, by the law of contracts, have no effect upon the rights of such creditors. Two debtors cannot, by thus getting together, affect the rights of their common creditor. In order to make a valid substitution of the continuing partners for the retiring partner, the common creditor must be a party to the arrangement, which must take the form of a novation,<sup>80</sup> which may be either express or implied.

<sup>80</sup> A person who is admitted as a partner into an existing firm does not thereby become liable to the creditors of the firm for any-

Whatever the form, the agreement for substitution must be based upon a consideration. A mere promise by the firm creditor to look to the continuing partner is not effective.<sup>81</sup> And an assent to an arrangement by which the new firm becomes liable for the debts of the old one does not of itself relieve the retiring partner from liability.<sup>82</sup>

*Same—Consideration for Agreement to Release Retiring Partner*

Some difficulty has been felt by the courts in finding the consideration for the promise of the old creditor to release the retiring partner and look only to the continuing partners. For example, A., B., and C. being partners, C. withdraws. A. and B. promise X., a firm creditor, that in consideration of his releasing C. they will pay X.'s claim against A., B., and C. But as A. and B. are already bound to pay X., their promise adds nothing to their liability, and is not a good consideration for X.'s promise to release C. This is the holding of a number of cases.<sup>83</sup> But in the case

thing done before he becomes a partner. A partner who retires from a firm does not thereby cease to be liable for partnership debts or obligations incurred before his retirement. A retiring partner may be discharged from existing liabilities by an agreement to that effect between himself and the members of the firm as newly constituted and the creditors, and this agreement may be either express or inferred as a fact from the course of dealing between the creditors and the firm as newly constituted. *Flour City National Bank of Rochester v. Widener*, 163 N. Y. 276, 279, 57 N. E. 471; *Frye & Bruhn v. Phillips*, 46 Wash. 190, 89 Pac. 559. See "*Partnership*," *Dec. Dig. (Key No.)* §§ 236, 237; *Cent. Dig.* §§ 484-494.

<sup>81</sup> *Thomas v. Shillabeer*, 1 N. & W. 124; *Clark v. Billings*, 59 Ind. 508; *Eagle Mfg. Co. v. Jennings*, 29 Kan. 657, 44 Am. Rep. 668; *Chase v. Vaughan*, 30 Me. 412; *Wildes v. Fessenden*, 4 Metc. (Mass.) 12; *Walstrom v. Hopkins*, 103 Pa. 118; *Collyer v. Moulton*, 9 R. I. 90, 98 Am. Dec. 370. See "*Partnership*," *Dec. Dig. (Key No.)* §§ 236, 237; *Cent. Dig.* §§ 484-494.

<sup>82</sup> *Harris v. Farwell*, 15 Beav. 31. See "*Partnership*," *Dec. Dig. (Key No.)* §§ 236, 237; *Cent. Dig.* §§ 484-494.

<sup>83</sup> *Lodge v. Dicus*, 3 B. & Ald. 210; *David v. Ellice*, 5 B. & C. 196. These cases must be held to be overruled by *LYTH v. AULT & WOOD*, 7 Exch. 669, *Gilmore, Cas. Partnership*, 336, and *Thompson v. Percival*, 5 B. & Ad. 925. See, also, the remarks of *Wigram, V. C.*

of *Lyth v. Autl & Wood*<sup>84</sup> it was held that the consideration, even though it was to pay a debt for which the promisor was already liable, was sufficient to sustain the creditor's promise to release the retiring partner. In that case there was a partnership of A. and B. A. withdrew and B. continued the business. X., a firm creditor, agreed, in consideration of a payment by B. of a part of X.'s debt and a promise to pay the balance, to release A. from further liability. It was objected that there was no consideration for X.'s promise. In holding that the consideration was sufficient, Baron Parke said: "It cannot be doubted that the sole security of one of two joint debtors may be more beneficial than the joint responsibility of both. In the latter case, you are not entitled to sue one with safety, for the defendant may plead in abatement the nonjoinder of his co-contractor. In case of the bankruptcy of one of the partners, there would also be a difference. \* \* \* Where there is more than one debtor, the creditor's remedy is different. There is, therefore, no doubt that the thing substituted is altogether different from the original debt."

This view of Baron Parke has generally prevailed.<sup>85</sup> While what was said related to the dissolution of a partnership of two, the reasoning would seem to be applicable to a partnership composed of more than two.

The question of sufficiency of consideration will not arise

in *Mills v. Boyd*, 6 Jur. 943; *Early v. Burt*, 68 Iowa, 716, 23 N. W. 35; *Wild v. Dean*, 3 Allen (Mass.) 579.

"The promise of a creditor to release the outgoing and look to the continuing partners for payment is not binding for want of consideration. The creditor had the several liability of the continuing partner already in the joint obligation." *Parsons (James) Partn.* § 95. See "*Partnership*," *Dec. Dig. (Key No.)* §§ 236-239; *Cent. Dig.* §§ 484-499.

<sup>84</sup> *LYTH v. AULT & WOOD*, 7 Exch. 669, *Gilmore, Cas. Partnership*, 336. See "*Partnership*," *Dec. Dig. (Key No.)* §§ 236-239; *Cent. Dig.* §§ 484-499.

<sup>85</sup> *Thompson v. Percival*, 5 B. & Ad. 925; *In re Clap*, 2 Low. 226; *Backus v. Fobes*, 20 N. Y. 204; *Ludington v. Bell*, 77 N. Y. 138 33 Am. Rep. 601; *Allison v. Abendroth*, 108 N. Y. 470, 15 N. E. 606; *Collyer v. Moulton*, 9 R. I. 90, 98 Am. Dec. 370; *Ætna Ins. Co. v. Wires*, 28 Vt. 93. See "*Partnership*," *Dec. Dig. (Key No.)* §§ 236-239; *Cent. Dig.* §§ 484-499.

where, upon the retirement of an old partner, a new partner is taken in. If the new firm, which now contains a member not already liable on the debts of the original partnership, agrees to pay the old debts in consideration of the release of the retiring partner, the promise of release is clearly supported by adequate consideration. Very slight circumstances will justify a finding that the creditors agreed to accept the liability of the new firm in place of the old one.<sup>86</sup>

*Same—Novation by Implication*

It is entirely possible to establish a novation by implication from the conduct of the parties. As the retiring partner will usually be the one setting up his release from liability, he must plead and prove a valid agreement amounting to a novation. Being liable under the contract, the presumption is that he continues so unless discharged.<sup>87</sup> A creditor who, after a partner has retired from the firm, treats the continuing partners as his debtors, does not, without more, discharge the retired partner.<sup>88</sup> The fact that the creditor said nothing when informed that one of the partners had withdrawn and the continuing partner had assumed all the debts will not be sufficient to infer a novation.<sup>89</sup> Nor will the fact that the creditor, when so informed by the continuing partner, said, "All right; pay as fast as you can," be sufficient.<sup>90</sup> Even if the new firm adopts

<sup>86</sup> *Regester v. Dodge* (C. C.) 6 Fed. 6; s. c., 61 How. Prac. (N. Y.) 107. See "*Partnership*," *Dec. Dig.* (Key No.) §§ 236-239; *Cent. Dig.* §§ 484-499.

<sup>87</sup> *Benson v. Hadfield*, 4 Hare, 32, 37; *First Nat. Bank of Athens v. Green*, 40 Ohio St. 431, 440; *Botsford v. Kleinhans*, 29 Mich. 332. See "*Partnership*," *Dec. Dig.* (Key No.) §§ 236-239; *Cent. Dig.* §§ 484-499, 506.

<sup>88</sup> *Botsford v. Kleinhans*, *supra*. See "*Partnership*," *Dec. Dig.* (Key No.) §§ 236-239; *Cent. Dig.* §§ 484-499.

<sup>89</sup> *Wadhams v. Page*, 1 Wash. St. 420, 25 Pac. 462. See "*Partnership*," *Dec. Dig.* (Key No.) §§ 236-239; *Cent. Dig.* §§ 484-499.

<sup>90</sup> *MOTLEY v. WICKOFF*, 113 Mich. 231, 71 N. W. 520, *Gilmore, Cas. Partnership*, 337. In this case the creditor also promised the retiring partner to release him; but the court held that there was no consideration for the promise.

In *KIRWAN v. KIRWAN*, 2 C. & M. 617, the creditor's statement to the retiring partner that he knew he had no further claim

the old debt and pays the interest on it, this is prima facie evidence only of some agreement between the partners themselves, and a creditor who does no more than allow the partner to carry out this agreement does not debar himself of his right to look for payment to those originally indebted to him.<sup>91</sup> Moreover, if the continuing partners give a new security for the old debt, this will not operate to discharge the retired partner, unless the creditors intended that such should be the case, or unless the new security is of such a nature as to merge the original debt.<sup>92</sup> But the fact that a creditor has taken from a continuing partner a new security for a debt due from him and the retiring partner jointly is strong evidence of an intention to look only to the continuing partner for payment.<sup>93</sup>

A creditor may so conduct himself as to be estopped from saying that a retired partner is still liable to him. A settlement by partners of their accounts on the footing that one of them only is liable to the creditor will not affect him, unless he has been guilty of some fraud, or has done some act or made some statement in order to induce the partners, or one of them, to settle their accounts on the faith that one of them is no longer liable.<sup>94</sup>

on him was held not to release him. See "*Partnership*," *Dec. Dig.* (Key No.) §§ 236-239; *Cent. Dig.* §§ 484-499.

<sup>91</sup> *HALL v. JONES*, 56 Ala. 493, Gilmore, Cas. Partnership, 339; *United States Nat. Bank v. Underwood*, 2 App. Div. 342, 37 N. Y. Supp. 838; *Day v. Wetherby*, 29 Wis. 363; *Griffie v. Griffie*, 173 Pa. 434, 34 Atl. 441; *Hopkins v. Carr*, 31 Ind. 280; *Gulick v. Gulick*, 16 N. J. Law, 186. See "*Partnership*," *Dec. Dig.* (Key No.) §§ 236-239; *Cent. Dig.* §§ 484-499, 506.

<sup>92</sup> *Walstrom v. Hopkins*, 103 Pa. 118; *Ludington v. Bell*, 77 N. Y. 138, 33 Am. Rep. 601.

It has been held that a creditor may take the negotiable paper of the new firm or continuing partner, without releasing the original debtors, if it was taken merely as security for the old debt. *Smith v. Rogers*, 17 Johns. (N. Y.) 340; *First Nat. Bank of Athens v. Green*, 40 Ohio St. 431; *In re Head* (1893) 3 Ch. 428. See "*Partnership*," *Dec. Dig.* (Key No.) §§ 236-239; *Cent. Dig.* §§ 484-499, 506.

<sup>93</sup> *Evans v. Drummond*, 4 Esp. 89. See "*Partnership*," *Dec. Dig.* (Key No.) §§ 236-239; *Cent. Dig.* §§ 484-499, 506.

<sup>94</sup> *Register v. Dodge* (C. C.) 6 Fed. 6, 19 Blatchf. 79; *Harris v.*

*Modified Liability of Retiring Partner*

While a novation is a well-recognized method whereby a retiring partner may be released from liability, and the continuing partner, either alone or with a stranger who joins the firm, may be substituted for him, there is a common situation arising upon the retirement of a partner that does not amount to a novation.<sup>95</sup> Without consulting their common creditor, the members of a firm may agree that one of them shall retire, and that the other shall continue the business and pay all the existing debts. Such an arrangement is entirely proper and valid as between themselves. By it the continuing partner becomes the principal debtor and the retiring partner becomes merely a surety, with a right to indemnity from his copartner in case he is called upon to pay any of the firm debts.<sup>96</sup> It is also well settled that if two persons become jointly bound to a third person, apparently as principals, but one is in fact a surety for the other, the third person to whom the obligation runs must treat him as a surety, on notice of the fact being given him.<sup>97</sup> Since a partner who has obtained an agreement from his copartner to assume the firm debts becomes as to

Farwell, 13 Beav. 403; Featherstone v. Hunt, 1 Barn. & C. 113; Davison v. Donaldson, 9 Q. B. Div. 623.

In Porter v. Baxter, 71 Minn. 195, 73 N. W. 844, a dealer in furniture contracted to supply certain goods to defendants as partners, to be shipped by a specified date. Before the arrival of that time one of the partners retired and a new firm continued the business. With knowledge of this fact the dealer shipped the goods to the new firm. It was held that the retiring partner was no longer liable. See "Partnership," Dec. Dig. (Key No.) §§ 236-239; Cent. Dig. §§ 484-499.

<sup>95</sup> For a full collection of the authorities on the subject, see the notes to Dean Co. v. Collins, 9 L. R. A. (N. S.) 49. See "Partnership," Dec. Dig. (Key No.) §§ 236-239; Cent. Dig. §§ 484-499.

<sup>96</sup> McAREAVY v. MAGRILL, 123 Iowa, 605, 99 N. W. 193, Gilmore, Cas. Partnership, 330; PRESTON v. GARRARD, 120 Ga. 689, 48 S. E. 118, 102 Am. St. Rep. 124, Gilmore, Cas. Partnership, 334; Fairfield v. Day, 71 N. H. 63, 51 Atl. 263. See "Partnership," Dec. Dig. (Key No.) § 239; Cent. Dig. §§ 487, 488.

<sup>97</sup> Overend, Gurney & Co. v. Oriental Financial Corporation, L. R. 7 Ch. 142; Lauman v. Nichols, 15 Iowa, 161. See "Partnership," Dec. Dig. (Key No.) § 239; Cent. Dig. §§ 487, 488.

such partner a surety,<sup>98</sup> and since one apparently a principal debtor can compel the creditor to treat him as a surety, if he is in fact such, many courts hold that a retiring partner becomes as to those creditors who have notice of the agreement a surety merely, and is, therefore, entitled to the rights of a surety.<sup>99</sup> This view has been thus stated in the House of Lords: "If, notwithstanding that both the debtors appeared to be principal debtors, the knowledge afterwards that one of them is a surety only disentitles you to deal with the other in the way of giving time without discharging that debtor, then it seems to me it must equally be the case (for otherwise there would be a distinction, resting on no intelligible or solid basis) that where, although both are principal debtors at the time, one of them afterwards, as between himself and his codebtor, becomes a surety, that one is discharged if time be given to the other."<sup>1</sup>

On the other hand, it is maintained that there is a distinction between the case where an obligor was originally a surety, though not known to be such by the obligee, and the case where one of two partners seeks by a contract between himself and his partner to change his relation to the firm creditors from that of a principal debtor to that of a surety. In the former case the original and true relation of the makers to the debt is unchanged, while in the latter "the debtors seek by an agreement between themselves alone to change their relations to the debt without the con-

<sup>98</sup> *Rodgers v. Maw*, 15 M. & W. 444. See "*Partnership*," *Dec. Dig. (Key No.)* § 239; *Cent. Dig.* §§ 487, 488.

<sup>99</sup> *SMITH v. SHELDON*, 35 Mich. 42, 24 Am. Rep. 529, Gilmore, Cas. Partnership, 332; *PRESTON v. GARRARD*, 120 Ga. 689, 48 S. E. 118, 102 Am. St. Rep. 124, Gilmore, Cas. Partnership, 334; *Wiley v. Temple*, 85 Ill. App. 69; *Colgrove v. Tallman*, 67 N. Y. 95, 23 Am. Rep. 90; *Millerd v. Thorn*, 56 N. Y. 402; *Lazelle v. Miller*, 40 Or. 549, 67 Pac. 307. See "*Partnership*," *Dec. Dig. (Key No.)* § 239; *Cent. Dig.* §§ 487, 488.

<sup>1</sup> Lord Herschell, L. C., in *Rouse v. Bradford Banking Co.*, L. R. (1894) App. Cas. 586, 592. See, also, *Oakeley v. Pasheller*, 10 Bll. (N. S.) 548. See "*Partnership*," *Dec. Dig. (Key No.)* § 239; *Cent. Dig.* §§ 487, 488.

sent of the creditors." \* This distinction it is declared will prevent an agreement between the partners changing the liability of one of them from that of a principal debtor to that of a surety because, "the liability of the partners as principal debtors being fixed by the terms of the original contract, it is not competent for them by any agreement between themselves to change the nature of that liability, or impose upon the creditor, without his consent, any new or additional obligation or duty, a neglect of which may work a discharge of one of such debtors from his obligation to pay. The agreement between the partners by which one of them assumes to pay the entire debt is regarded *res inter alios acta* as respects the creditor who is neither benefited nor prejudiced thereby." \*

A third view, which is a modification of the two given, seems to prevail in some jurisdictions. According to the view in these jurisdictions the creditor will, if he has knowledge of the agreement, be compelled to exercise reasonable diligence and good faith in enforcing his right against the partner who has assumed the debts of the firm. "Should the creditors fail, after notice, to perform these duties, and such failure result in damage to the retired partner, it might well be regarded in a court of equity as cause to release him, at least to the extent of his damage. In such case the terms of the contract have not been changed; but the fact that new relations had arisen between the partners, by which one assumes, as between them, the burdens of all, might well call upon the creditors to act in such a way as not to injure the retiring partner." The court in the case from which the above quotation was taken nevertheless de-

\* *McAREAVY v. MAGRIL*, 123 Iowa, 605, 99 N. W. 193, Gilmore, Cas. Partnership, 330. See "*Partnership*," *Dec. Dig. (Key No.)* § 239; *Cent. Dig.* §§ 487, 488.

\* *McAREAVY v. MAGRIL*, 123 Iowa, 605, 99 N. W. 193, Gilmore, Cas. Partnership, 330; *HALL v. JONES*, 56 Ala. 493, Gilmore, Cas. Partnership, 339; *Dean & Co. v. Collins*, 15 N. D. 535, 108 N. W. 242, 9 L. R. A. (N. S.) 49, 125 Am. St. Rep. 610; *Rawson v. Taylor*, 30 Ohio St. 389, 27 Am. Rep. 464; *White v. Boone*, 71 Tex. 712, 12 S. W. 51; *Buchanan v. Clark*, 10 Grat. (Va.) 164; *Barnes v. Boyers*, 34 W. Va. 303, 12 S. E. 708. See "*Partnership*," *Dec. Dig. (Key No.)* §§ 236-239; *Cent. Dig.* §§ 484-499.

clares: "We cannot, however, go to the extent of holding that a contract upon which two persons agree with a third to be jointly and primarily liable for a debt can be changed by the agreement of the debtors themselves, so as to require the creditor to accept one as a principal debtor and the other as a surety for its payment."<sup>4</sup>

### TERMINATION OF PARTNERSHIP LIABILITY IN CONTRACT

79. Termination of partnership liability should be considered with respect to
- (a) Past transactions.
  - (b) Future transactions.

#### SAME—PAST TRANSACTIONS

80. The liability on all partnership obligations which have been properly created during the continuance of the relationship can be terminated only in one of the methods recognized by law for the termination of joint contracts in general, viz.:
- (a) Payment.
  - (b) Release.
  - (c) Merger.
  - (d) Novation.

#### *Payment*

In a partnership debt there is but one debt owed, the joint debt of all. Therefore, if any one of the partners pays it, the obligation is discharged. If, however, one partner pays a firm creditor in such a manner as to show an intent that the debt shall be kept alive for his benefit, the other partners cannot plead such a payment in an action brought by the creditor. Thus, where one partner paid a partnership creditor and had the debt assigned to a trustee for him,

<sup>4</sup> *Grotte v. Well*, 62 Neb. 478, 87 N. W. 173. See "*Partnership*," *Dec. Dig. (Key No.)* § 239; *Cent. Dig.* §§ 487, 488.

it was held that it was not extinguished.<sup>5</sup> If the payment is made out of partnership money, it must be applied to the partnership debt and will extinguish it.<sup>6</sup>

*Same—Appropriation of Payments*

As the question of the appropriation of payments becomes important in the settling of partnership accounts, it will be necessary to state briefly the general rules governing the subject and their applicability to partnership cases:

(1) Where one person owes another two or more debts, they may agree upon the application of payments to one or more of the debts owed. (2) A debtor owing several distinct debts to the same person cannot insist upon paying a part of any one, but he can pay in full whichever he wishes in the order in which he wishes.<sup>7</sup> He must, however, exercise his right of selection at the time of payment; but he need not expressly indicate the debt which he desires to pay. His intention to pay a particular debt may be inferred from the circumstances of the payment.<sup>8</sup> (3) If the debtor does not exercise his right to select the debt to which his payment should be applied, the creditor may apply it. He has a reasonable time at least in which to exer-

<sup>5</sup> *McIntyre v. Miller*, 13 M. & W. 725. See "Partnership," *Dec. Dig. (Key No.)* §§ 143, 165; *Cent. Dig.* §§ 229-233½, 301.

<sup>6</sup> *THOMPSON v. BROWN*, Moo. & W. 40. See "Partnership," *Dec. Dig. (Key No.)* § 143; *Cent. Dig.* §§ 229-233½.

<sup>7</sup> *Lynn v. Bean*, 141 Ala. 236, 37 South. 515; *Wendt v. Ross*, 33 Cal. 650; *Boyd v. Watertown Agricultural Ins. Co.*, 20 Colo. App. 28, 76 Pac. 986; *Pickering v. Day*, 2 Del. Ch. 333; *Jackson v. Bailey*, 12 Ill. 159; *Thayer v. Denton*, 4 Mich. 192; *Seymour v. Marvin*, 11 Barb. (N. Y.) 80; *Patterson v. Van Loon*, 186 Pa. 367, 40 Atl. 495; *Hassard v. Tomkins*, 108 Wis. 186, 84 N. W. 174. See "Partnership," *Dec. Dig. (Key No.)* § 143; *Cent. Dig.* § 232; "Payment," *Dec. Dig. (Key No.)* §§ 36-47; *Cent. Dig.* §§ 99-129.

<sup>8</sup> *Shaw v. Picton*, 4 B. & C. 715; *Waters v. Tompkins*, 2 C., M. & R. 723; *Peters v. Anderson*, 5 Taunt. 596; *Wittkowsky v. Reid*, 82 N. C. 116; *Lysaght v. Walker*, 5 Bil. N. S. 1; *City Discount Co. v. McClean*, L. R. 9 C. P. 692. *Pearce v. Walker*, 103 Ala. 250, 15 South. 568; *Hanson v. Cordano*, 96 Cal. 441, 31 Pac. 457; *Mitchell v. Dall*, 2 Har. & G. (Md.) 159; *Roakes v. Bailey*, 55 Vt. 542. See "Partnership," *Dec. Dig. (Key No.)* § 143; *Cent. Dig.* § 232; "Payment," *Dec. Dig. (Key No.)* §§ 36-47; *Cent. Dig.* §§ 99-129.

cise his choice,\* and can apply it to any legal debt owed him by the debtor at the time the payment was made;<sup>10</sup> and even the debts barred by the statute of limitations in preference to those which have not been barred.<sup>11</sup>

In certain situations a legal presumption arises that the debtor intended that a payment should be appropriated in a certain manner, and the creditor can appropriate them in no other. Thus in payments on a running account it is presumed that payments are to be applied to the oldest items of the account.<sup>12</sup> This rule is very important in determining the liability of retired and deceased partners; for if the new firm or the surviving members continue the old accounts and make payments upon them, without specifying the parts of the account to be paid, the payments will be

\* *Simson v. Ingham*, 2 B. & O. 65; *Mills v. Fowkes*, 5 Bing. N. C. 455; *Mayor of Alexandria v. Patten*, 4 Cranch, 317, 320, 2 L. Ed. 633; *Fairchild v. Holly*, 10 Conn. 175; *Harker v. Conrad*, 12 Serg. & R. (Pa.) 301, 14 Am. Dec. 691. See "*Partnership*," *Dec. Dig. (Key No.)* § 143; *Cent. Dig.* § 232; "*Payment*," *Dec. Dig. (Key No.)* §§ 36-47; *Cent. Dig.* §§ 99-129.

<sup>10</sup> *Hammersley v. Knowlys*, 2 Esp. 665; *Goddard v. Hodges*, 1 Cr. & M. 33; *McCurdy v. Middleton*, 82 Ala. 131, 2 South. 721; *Lyon v. Bass*, 76 Ark. 534, 89 S. W. 849; *Byrnes v. Claffey*, 69 Cal. 120, 10 Pac. 321; *Nichols v. Culver*, 51 Conn. 177; *Lowenstein v. Meyer*, 114 Ga. 709, 40 S. E. 726; *Wellman v. Miner*, 179 Ill. 326, 53 N. E. 609; *Keairnes v. Durst*, 110 Iowa, 114, 81 N. W. 238; *Henry Bill Pub. Co. v. Utley*, 155 Mass. 366, 29 N. E. 635. See "*Partnership*," *Dec. Dig. (Key No.)* § 143; *Cent. Dig.* § 232; "*Payment*," *Dec. Dig. (Key No.)* §§ 36-47; *Cent. Dig.* §§ 99-129.

<sup>11</sup> *Friend v. Young*, [1897] 2 Ch. 421; *Mills v. Fowkes*, 5 Bing. N. C. 455; *Williams v. Griffiths*, 5 M. & W. 800; *Nash v. Hodgson*, Kay, 650; *Blake v. Sawyer*, 83 Me. 129, 21 Atl. 834, 12 L. R. A. 712, 23 Am. St. Rep. 762.

It should be noted, however, that such payment and appropriation does not serve as an admission which will take the debt itself out of the statute. This must be shown by other means. See "*Partnership*," *Dec. Dig. (Key No.)* § 143; *Cent. Dig.* § 232; "*Payment*," *Dec. Dig. (Key No.)* §§ 36-47; *Cent. Dig.* §§ 99-129.

<sup>12</sup> *Lazarus v. Freidheim*, 51 Ark. 371, 11 S. W. 518; *Molaskey v. Peery*, 76 Cal. 84, 18 Pac. 120; *Fairchild v. Holly*, 10 Conn. 175; *Johnson v. Foster (Iowa)* 101 N. W. 741. See "*Partnership*," *Dec. Dig. (Key No.)* § 143; *Cent. Dig.* § 232; "*Payment*," *Dec. Dig. (Key No.)* §§ 36-47; *Cent. Dig.* §§ 99-129.

appropriated to the items owed by the old firm.<sup>13</sup> The retired or deceased partner will be excused to that extent, even though he was, when a member of the firm, a dormant partner and his existence was unknown.<sup>14</sup> Moreover, though an incoming partner is not liable for the debts of the old firm, if the new firm with his assent<sup>15</sup> continues the old accounts without break, payments by such firm will be applied in payment of the debts of the old firm.<sup>16</sup>

#### *Release*

It has been pointed out that at common law a release of one of several joint debtors operated to release all of them. To avoid this effect of a release it became the custom, where a creditor wished to release one only of several joint obligors, to covenant not to sue him. Moreover, the courts mitigated the rigor of the rule by permitting a creditor to give to one joint debtor a qualified release, which, if properly worded, was held not to discharge the remaining joint-debtor.<sup>17</sup> Thus it was said in *North v. Wakefield*: "The deed contained an express clause that the release to Goddard should not operate to discharge any one jointly or otherwise liable to plaintiff for the same debts. It is plain, therefore, that it did not release the defendant. The reason why a release to one debtor releases all jointly liable is because, unless it be held to do so, the codebtor, after paying the debt, might sue him who was released for contribution, and so in effect he would not be released; but that reason does not apply where the debtor released agrees

<sup>13</sup> *Devaynes v. Noble*, 1 Mer. 529; *Sleech's Case*, 1 Mer. 540; *Clayton's Case*, 1 Mer. 572. See "*Partnership*," *Dec. Dig.* (Key No.) § 143; *Cent. Dig.* § 232; "*Payment*," *Dec. Dig.* (Key No.) §§ 36-47; *Cent. Dig.* §§ 99-129.

<sup>14</sup> *Newmarch v. Clay*, 14 East, 239; *Brooke v. Enderby*, 2 Brod. & B. 70; *Fairchild v. Holly*, 10 Conn. 175. See "*Partnership*," *Dec. Dig.* (Key No.) §§ 143, 236-239; *Cent. Dig.* §§ 232, 493½.

<sup>15</sup> *St. Louis Type Foundry Co. v. Wisdom*, 72 Tenn. 695. See "*Partnership*," *Dec. Dig.* (Key No.) §§ 143, 236-239; *Cent. Dig.* §§ 232, 493½.

<sup>16</sup> *Morgan v. Tarbell*, 28 Vt. 498. See "*Partnership*," *Dec. Dig.* (Key No.) §§ 143, 236-239; *Cent. Dig.* §§ 232, 493½.

<sup>17</sup> *Solly v. Forbes*, 2 Bro. & B. 38. See "*Release*," *Dec. Dig.* (Key No.) § 28; *Cent. Dig.* §§ 57-62.

to such a qualification of the release as will leave him liable to any rights of the codebtor."<sup>18</sup> Partnership debts being joint debts, these rules with respect to covenants not to sue and releases apply to such debts. Thus in *Northern Insurance Co. v. Potter*<sup>19</sup> it was held that a release of two of three partners did not release the third, it being specifically agreed that the release should not have that effect.<sup>20</sup>

### *Merger*

Since at common law the promise in a joint obligation was merged in a judgment obtained on that promise, the same was true of partnership obligations. A different rule was once laid down in the United States Supreme Court in the case of *Sheehy v. Mandeville & Jamesson*;<sup>21</sup> but it was later decided, in accordance with the weight of authority, that a judgment obtained on a partnership note in a suit in which only one of the partners was served constituted a bar to a subsequent action against the partner not served, because the obligation was merged in the judgment obtained.<sup>22</sup> The court said: "A judgment against one upon a joint contract of several persons bars an action against the others, though the latter were dormant partners of the defendant in the original action, and this fact was unknown to the plaintiff when that action was commenced. When the contract is joint, and not joint and several, the entire cause of action is merged in the judgment. The joint liability of the parties not sued with those against whom the judgment is recovered being extinguished, their entire liability is gone. They cannot be sued separately, for they have incurred no several obligation. They cannot be sued

<sup>18</sup> *Patterson, J., in North v. Wakefield*, 13 Q. B. 536, 540. See "Release," *Dec. Dig. (Key No.)* § 28; *Cent. Dig.* §§ 57-62.

<sup>19</sup> *NORTHERN INSURANCE CO. v. POTTER*, 63 Cal. 157, Gilmore, *Cas. Partnership*, 286. See "Release," *Dec. Dig. (Key No.)* § 28; *Cent. Dig.* §§ 57-62.

<sup>20</sup> By statute it is provided in many jurisdictions that a release of one partner shall not operate as a release of the others. See *Stim. Am. Statute Law*, § 5330.

<sup>21</sup> 6 Cranch, 254, 3 L. Ed. 215. See "Judgment," *Dec. Dig. (Key No.)* § 628; *Cent. Dig.* § 1144.

<sup>22</sup> *MASON v. ELDRED*, 6 Wall, 231, 18 L. Ed. 783, *Gilmore Cas. Partnership*, 281. See "Judgment," *Dec. Dig. (Key No.)* § 628; *Cent. Dig.* § 1144.

jointly with the others, because judgment has been already recovered against the latter, who would otherwise be subjected to two suits for the same cause."<sup>23</sup>

#### *Novation*

As pointed out in considering the liability of an incoming partner,<sup>24</sup> it is always possible under the law governing novation for one debtor to be substituted for another. By means of a novation, therefore, the existing debt of the members of a firm may be transferred to strangers. Such novation must be effected in conformity with the rules applicable to novations generally.

### **SAME—FUTURE TRANSACTIONS**

81. So long as the partnership relation continues the mutual agency of the partners to bind one another exists. In order to terminate liability for future transactions the relation must be dissolved. The dissolution may be

- (a) By operation of law.
- (b) By act of the parties.

### **SAME—DISSOLUTION BY OPERATION OF LAW**

82. Where the dissolution is by operation of law, this of itself terminates all liability of a partner for future transactions, and all persons are bound to take notice of the change.

#### *Dissolution by Operation of Law*

A partnership may be dissolved by operation of law. Ordinarily the event which is designated by law as ter-

<sup>23</sup> The joint debtor acts which have been passed by many of the states apply to partnership debts, and prevent a judgment against less than all of the partners from having the effect of extinguishing the obligation existing against the others. *Hall v. Lanning*, 91 U. S. 160, 23 L. Ed. 271; *MASON v. ELDRED*, 6 Wall. 231, 18 L. Ed. 783, *Gilmore, Cas. Partnership*, 281. See, also, chapter IX, post, pp. 543-545. See "*Judgment*," *Dec. Dig. (Key No.)* § 628; *Cent. Dig.* § 1144; "*Partnership*," *Dec. Dig. (Key No.)* §§ 165-173; *Cent. Dig.* §§ 301-305.

<sup>24</sup> See ante, p. 244.

minating a partnership is of sufficient notoriety to put one on his guard; but, whether so or not, it terminates the liability of each partner, and also of his estate, for the future acts of his partners, without any notice being given. Having no voice in the termination of the partnership, he is not held to the same standard of conduct as where he voluntarily terminates the relationship. Thus, if a partnership is terminated by war between the countries of the respective partners, no notice of the dissolution need be given.<sup>25</sup> The same is true in the case of the death of one partner.<sup>26</sup> The rule of agency which prevails in the case of the death of a principal prevails in this situation, and by such dissolution of a partnership the agency of each partner is thereby terminated. This is subject to the qualification that the agency of a partner does continue for the purposes of winding up the firm business and the surviving partners have all power necessary for that purpose.<sup>27</sup> So, also, where one partner becomes bankrupt,<sup>28</sup> or is adjudged insane.<sup>29</sup>

<sup>25</sup> LYON v. JOHNSON, 28 Conn. 1, Gilmore, Cas. Partnership, 341. Planters' Bank v. St. John, Fed. Cas. No. 11,208; GRISWOLD v. WADDINGTON, 15 Johns. (N. Y.) 57, Gilmore, Cas. Partnership, 600; Id., 16 Johns. (N. Y.) 438; Dickinson v. Dickinson, 25 Grat. (Va.) 321, 329; FOX v. HANBURY, Cowp. 445; Thomason v. Frere, 10 East, 418; Morgan v. Marquis, 9 Exch. 145. See "Partnership," Dec. Dig. (Key No.) § 290; Cent. Dig. § 651.

<sup>26</sup> LYON v. JOHNSON, 28 Conn. 1, Gilmore, Cas. Partnership, 341; Williams v. Rogers, 14 Bush (Ky.) 776; Price v. Succession of Mathews, 14 La. Ann. 11; Washburn v. Goodman, 17 Pick. (Mass.) 519; MARLETT v. JACKMAN, 3 Allen (Mass.) 237; Caldwell v. Stileman, 1 Rawle (Pa.) 212; Devaynes v. Noble, 1 Mer. 616; Vulhamy v. Noble, 3 Mer. 592, 614. See "Partnership," Dec. Dig. (Key No.) § 290; Cent. Dig. § 651.

<sup>27</sup> Weiss v. Hamilton, 40 Mont. 99, 105 Pac. 74.

In Usher v. Dansey, 4 Camp. 97, it was held that the agency of an agent of a partnership, such agent not being himself a partner, was not terminated by the death of a partner; Lord Ellenborough declaring that that authority of the agent must be considered to

<sup>28</sup> EUSTIS v. BOLLES, 146 Mass. 413, 16 N. E. 286, 4 Am. St. Rep. 327, Gilmore, Cas. Partnership, 603; Watterson v. Patrick (Pa.) 1 Atl. 602. See "Partnership," Dec. Dig. (Key No.) § 271; Cent. Dig. § 616.

<sup>29</sup> Isler v. Baker, 6 Humph. (Tenn.) 85. See "Partnership," Dec. Dig. (Key No.) § 274; Cent. Dig. § 621.

**SAME—DISSOLUTION BY ACT OF THE PARTIES**

83. Where the dissolution is by the act of the parties, liability for future transactions will cease only upon the giving of due notice of such change. The notice must be given:

- (a) To the public generally. This may be done by publishing in a newspaper or by any other equally effective method.
- (b) To those who have extended credit to the firm. This notice must be actual.

**EXCEPTION:** A dormant partner is not required to give notice of his retirement from a firm in order to prevent his further liability for future transactions.

A partnership may be dissolved either by operation of law or by the act of the parties. If it is dissolved by the act of the parties, they must, in order to escape liability for the future acts of their former partners, give notice of the dissolution of the partnership. The reason for this rule is the same as in other cases of revocation of agency, and is variously stated as resting on estoppel, or on negligence inducing credit, or on the presumption of a continuance of an existing state of affairs, or on the theory of a holding out as partners. "When one of two parties is to sustain injury from the giving of credit, the one who originally induced it should bear the loss, rather than the one who, without notice of the change, relied upon the continued existence of the partnership."<sup>80</sup> This reason does not apply,

emanate from the partnership, and not from the partners as individuals. This case has been sometimes regarded as authority for the view that the agency of such an agent is unaffected by the death of a partner. It seems probable, however, that it would only be held to exist in the same modified sense as does that of the surviving partners. See *Bank of New York v. Vanderhorst*, 32 N. Y. 558. See "*Partnership*," *Dec. Dig. (Key No.)* §§ 243-258, 275; *Cent. Dig.* §§ 509-598, 621.

<sup>80</sup> *AUSTIN v. HOLLAND*, 69 N. Y. 571, 577, 25 Am. Rep. 246, Gllmore, *Cas. Partnership*, 343. See "*Partnership*," *Dec. Dig. (Key No.)* §§ 288-292; *Cent. Dig.* §§ 651-661.

however, where the dissolution is by death or bankruptcy, or any other cause which terminates the partnership by operation of law. But if a firm is dissolved by mutual consent, and one member retires, while the rest conduct the same business under the same name, the retiring member will be held liable on the contracts of the new firm to those who relied on the credit of the old firm, unless he gives proper notice of the dissolution of the partnership.<sup>31</sup> Notice is necessary, also, where the partnership expires by the limitation created in the original articles,<sup>32</sup> unless the plaintiff knew the term the partnership was to continue.<sup>33</sup>

Even if a retiring partner does give notice of dissolution, he may, of course, be held by estoppel for the subsequent

<sup>31</sup> *Graham v. Hope*, Peake, 154; *Moline Wagon Co. v. Rummell* (C. C.) 12 Fed. 658; *Stewart v. Sonneborn*, 51 Ala. 126, *Williams v. Bowers*, 15 Cal. 321, 76 Am. Dec. 489; *Johnson v. Totten*, 3 Cal. 343, 58 Am. Dec. 412; *Holland v. Long*, 57 Ga. 36; *Carmichael v. Greer*, 55 Ga. 116; *Ennis v. Williams*, 30 Ga. 691; *Holtgreve v. Wintker*, 85 Ill. 470; *Page v. Brant*, 18 Ill. 37; *Stall v. Cassady*, 57 Ind. 234; *Denman v. Dossan*, 19 La. Ann. 9; *Lowe v. Penny*, 7 La. Ann. 356; *Pope v. Risley*, 23 Mo. 185; *Scheffelin v. Stevens*, 60 N. C. 106, 84 Am. Dec. 355; *Deering v. Flanders*, 49 N. H. 225; *Zollner v. Janvrin*, 47 N. H. 324; *AUSTIN v. HOLLAND*, 69 N. Y. 571, 25 Am. Rep. 246, *Gilmore, Cas. Partnership*, 343; *Vernon v. Manhattan Co.*, 17 Wend. (N. Y.) 524; *Shamburg v. Ruggles*, 83 Pa. 148; *Kenney v. Altvater*, 77 Pa. 34; *Little v. Clarke*, 36 Pa. 114; *White v. Murphy*, 3 Rich. Law (S. C.) 369; *Hutchins v. Hudson*, 8 Humph. (Tenn.) 426; *Kirkman v. Snodgrass*, 3 Head (Tenn.) 370; *Davis v. Willis*, 47 Tex. 154; *Tudor v. White*, 27 Tex. 584; *Prentiss v. Sinclair*, 5 Vt. 149, 26 Am. Dec. 288; *Dickinson v. Dickinson*, 25 Grat. (Va.) 321; *Benjamin v. Covert*, 47 Wis. 375, 2 N. W. 625. See "*Partnership*," *Dec. Dig. (Key No.)* §§ 288-292; *Cent. Dig.* §§ 651-661.

<sup>32</sup> *Holt v. Simmons*, 16 Mo. App. 97; *Ketcham v. Clark*, 6 Johns. (N. Y.) 144, 5 Am. Dec. 197. See "*Partnership*," *Dec. Dig. (Key No.)* §§ 288-292; *Cent. Dig.* §§ 651-661.

<sup>33</sup> *Schlater v. Winpenny*, 75 Pa. 321.

Where members of an existing partnership dissolved it and formed a corporation, without changing the original firm name in such a way as to indicate the incorporation, it was held that notice of dissolution should have been given. *Martin v. Fewell*, 79 Mo. 401; *Goddard v. Pratt*, 16 Pick. (Mass.) 412; *Willey v. Thompson*, 9 Metc. (Mass.) 329, 331. See "*Partnership*," *Dec. Dig. (Key No.)* §§ 288-292; *Cent. Dig.* §§ 651-661.

acts of the other partners, if he knowingly permits his name to be used in the partnership business.<sup>34</sup> But merely allowing the business to continue in the old firm name does not of itself make him liable.<sup>35</sup>

Notwithstanding a dissolution, each partner has the implied power to do all acts necessary to settle demands against the firm and to complete transactions incompleated at the time of dissolution.<sup>36</sup>

*Notice to the Public*

In the giving of notice there are two classes of persons to consider: The public generally, and those who have previously relied on the credit of the firm. It cannot be expected that actual notice shall be given to all members of the public on the dissolution of a firm. It is sufficient if reasonable means are used to make them aware of the change in the firm. It has been held in England that a publication in the London Gazette was sufficient notice as against those who had no prior dealings with the firm, whether they actually saw such publication or not.<sup>37</sup> A similar rule has been applied in this country.<sup>38</sup> In some

<sup>34</sup> See section 21, chapter I, p. 61, on Estoppel.

<sup>35</sup> Webster v. Webster, 3 Swanst. 490, note; Newsome v. Coles, 2 Camp. 617; Ex parte Central Bank of London, [1892] 2 Q. B. 633. See "*Partnership*," *Dec. Dig. (Key No.)* §§ 228, 293; *Cent. Dig.* §§ 476, 665.

<sup>36</sup> Yale v. Eames, 1 Metc. (Mass.) 486; Tutt v. Cloney, 62 Mo. 116; Thursby v. Lidgerwood, 69 N. Y. 198; Murray v. Mumford, 6 Cow. (N. Y.) 441; Moist's Appeal, 74 Pa. 166. See, further, chapter V, Powers of Partners, Powers of Partners after Dissolution, §§ 114-122, post, p. 339. See "*Partnership*," *Dec. Dig. (Key No.)* §§ 277-287; *Cent. Dig.* §§ 622-650.

<sup>37</sup> Godfrey v. Turnbull, 1 Esp. N. P. C. 371; Newsome v. Coles, 2 Camp. 617.

"An advertisement in the London Gazette as to a firm whose principal place of business is in England or Wales, in the Edinburgh Gazette as to a firm whose principal place of business is in Scotland, and in the Dublin Gazette as to a firm whose principal place of business is in Ireland, shall be notice as to persons who had not dealings with the firm before the date of the dissolution or change so advertised." Partnership Act (1890) § 36 (2). See "*Partnership*," *Dec. Dig. (Key No.)* §§ 289-292; *Cent. Dig.* §§ 651-661.

<sup>38</sup> Shurlds v. Tilson, 2 McLean, 458, Fed. Cas. No. 12,827; Mauldin v. Branch Bank at Mobile, 2 Ala. 502; Lucas v. Bank of Darien,

cases, it has been held that a change in the name of a firm was sufficient notice of dissolution, even to prior dealers;<sup>39</sup> in others, notoriety of the change in the firm has been held equivalent to published notice.<sup>40</sup>

*Actual Notice—Who are Entitled to*

Those who have previously dealt with the partnership, relying on its credit, must be given actual notice of a dissolution. Such persons are usually designated "former dealers" or "former customers." The terms are vague and indefinite. No exhaustive definition of their meaning can be given. It must be arrived at by a process of judicial inclusion and exclusion. The essential requisite, in order to constitute one a former customer entitled to actual notice, is dealing with the partnership on credit. The credit must

2 Stew. (Ala.) 280; *Martin v. Searles*, 28 Conn. 43; *Polk v. Oliver*, 58 Miss. 566; *Graves v. Merry*, 6 Cow. (N. Y.) 701, 16 Am. Dec. 471; *Lansing v. Gaine*, 2 Johns. (N. Y.) 300, 3 Am. Dec. 422; *Watkinson v. Bank of Pennsylvania*, 4 Whart. (Pa.) 482, 34 Am. Dec. 521; *Planters' & Mechanics' Bank v. Gallott*, 1 McMul. (S. C.) 209, 36 Am. Dec. 256; *Martin v. Walton*, 1 McCord (S. C.) 16; *Simonds v. Strong*, 24 Vt. 642.

"It is not an absolute, inflexible rule that there must be a publication in a newspaper to protect a retiring partner. That is one of the circumstances contributing to or forming the general notice required. It is an important one; but it is not the only or an indispensable one. Any means that, in the language of Mr. Bell, are fair means to publish as widely as possible the fact of dissolution, or which, in the words of Judge Edmonds, are public and notorious to put the public on its guard, or, in the words of Judge Nelson, notice in any other public or notorious manner, or, in the language of Mr. Verplank, notice by advertisement or otherwise, or by withdrawing the exterior indications of partnership and giving public notice in the manner usual in the community where he resides, are means and circumstances proper to be considered on the question of notice." *Lovejoy v. Spafford*, 93 U. S. 430, 440, 23 L. Ed. 851, by Hunt, J. See "*Partnership*," *Dec. Dig. (Key No.)* §§ 289-292; *Cent. Dig.* §§ 651-661.

<sup>39</sup> *Barfoot v. Goodall*, 3 Camp. 147. See "*Partnership*," *Dec. Dig. (Key No.)* § 291; *Cent. Dig.* §§ 657-660.

<sup>40</sup> *Hart v. Alexander*, 2 M. & W. 484; *Lovejoy v. Spafford*, 93 U. S. 430, 23 L. Ed. 851; *SOLOMON v. KIRKWOOD*, 55 Mich. 256, 21 N. W. 336, *Gilmore, Cas. Partnership*, 589. But see *Martin v. Searles*, 28 Conn. 43; *Goddard v. Pratt*, 16 Pick. (Mass.) 412. See "*Partnership*," *Dec. Dig. (Key No.)* § 291; *Cent. Dig.* §§ 657-660.

have been given directly to the firm.<sup>41</sup> Those who have given credit to the firm without its knowledge or consent, as by discounting its commercial paper, are not entitled to notice of the dissolution.<sup>42</sup> Former dealers are presumed to know the composition of the partnership, and to rely on the individual credit of each ostensible member. They are, hence, entitled to act on this knowledge till informed to the contrary. No practical difficulty can exist in their case, since their names are on the partnership books and actual notice can be imparted to them. Those who have previously dealt with the firm, but always for cash or without becoming firm creditors, are not entitled to greater notice than the public generally.<sup>43</sup> But those who have loaned money to the firm,<sup>44</sup> or have sold goods to it on credit, even though the amount is small, and the credit was implied, are entitled to actual notice of dissolution;<sup>45</sup> also those who have discounted paper for the partnership,<sup>46</sup> or have de-

<sup>41</sup> *Green v. Waco State Bank*, 78 Tex. 2, 14 S. W. 253. See "*Partnership*," *Dec. Dig. (Key No.)* § 289; *Cent. Dig.* §§ 652, 653.

<sup>42</sup> *City Bank of Brooklyn v. McChesney*, 20 N. Y. 241; *Hutchins v. Bank of State*, 8 Humph. (Tenn.) 418. But see *Vernon v. Manhattan Co.*, 17 Wend. (N. Y.) 524; *Id.*, 22 Wend. (N. Y.) 183; *Mechanics' Bank v. Livingston*, 33 Barb. (N. Y.) 458. See "*Partnership*," *Dec. Dig. (Key No.)* § 289; *Cent. Dig.* §§ 652, 653.

<sup>43</sup> *ASKEW v. SILMAN*, 95 Ga. 678, 22 S. E. 573; *Merritt v. Williams*, 17 Kan. 287.

Obviously those persons who have no knowledge whatever of the existence of a partnership, and who have never had any dealings under the belief that there was a firm, are not entitled to notice of any kind. *Austin v. Appling*, 88 Ga. 54, 13 S. E. 955; *Chamberlain v. Dow*, 10 Mich. 319; *Swigert v. Aspden*, 52 Minn. 565, 54 N. W. 738; *Bloch v. Price*, 24 Mo. App. 14; *Blanks v. Halfin* (Tex. Civ. App.) 30 S. W. 941. See "*Partnership*," *Dec. Dig. (Key No.)* § 289; *Cent. Dig.* §§ 652, 653.

<sup>44</sup> *Jansen v. Grimshaw*, 26 Ill. App. 287; *Howell v. Adams*, 68 N. Y. 314; *Buffalo City Bank v. Howard*, 35 N. Y. 500; *Williams v. Birch*, 6 Bosw. (N. Y.) 299. See "*Partnership*," *Dec. Dig. (Key No.)* § 289; *Cent. Dig.* §§ 652, 653.

<sup>45</sup> *Clapp v. Rogers*, 12 N. Y. 283. See "*Partnership*," *Dec. Dig. (Key No.)* § 289; *Cent. Dig.* §§ 652, 653.

<sup>46</sup> *ROSE v. COFFIELD*, 53 Md. 18, 36 Am. Rep. 389, *Gilmore, Cas. Partnership*, 346; *Bank of Commonwealth v. Mudgett*, 44 N. Y. 514; *National Shoe & Leather Bank of City of New York v. Herz*,

posited money with it,<sup>47</sup> or have indorsed accommodation paper for it,<sup>48</sup> or have made advancements to it as factors or consignees,<sup>49</sup> even though there were but one or two transactions, are entitled to actual notice.<sup>50</sup>

*Same—What is Sufficient Notice*

No particular form of notice is necessary. It is sufficient to show that actual notice was brought home to the one seeking to enforce a partnership liability. Thus it has been held that a change in the name of the firm was sufficient.<sup>51</sup> Anything which should put an ordinarily prudent man on his guard is sufficient, as an informal unsigned notice of dissolution,<sup>52</sup> or a notorious and violent dissolution of a firm in Mobile, Ala., followed by a change in location to Milwaukee, Wis., where the business was continued in the name of the former firm.<sup>53</sup> As to whether or not actual notice has been given, it has been held that the jury might infer that it had been given from evidence that plaintiff's credit man was accustomed to read the daily slips of a commercial agency which contained notice of such dissolution.<sup>54</sup> Also the fact that plaintiff took a certain paper in

80 N. Y. 629; *National Bank v. Norton*, 1 Hill (N. Y.) 572. See "Partnership," *Dec. Dig. (Key No.)* § 289; *Cent. Dig.* §§ 652, 653.

<sup>47</sup> *Howell v. Adams*, 68 N. Y. 314. See "Partnership," *Dec. Dig. (Key No.)* § 289; *Cent. Dig.* §§ 652, 653.

<sup>48</sup> *Hutchins v. Sims*, 8 Humph. (Tenn.) 423. See "Partnership," *Dec. Dig. (Key No.)* § 289; *Cent. Dig.* §§ 652, 653.

<sup>49</sup> *Williams v. Birch*, 6 Bosw. (N. Y.) 299. See "Partnership," *Dec. Dig. (Key No.)* § 289; *Cent. Dig.* §§ 652, 653.

<sup>50</sup> *LYON v. JOHNSON*, 28 Conn. 1, Gilmore, Cas. Partnership, 341; *Wardwell v. Haight*, 2 Barb. (N. Y.) 549. See "Partnership," *Dec. Dig. (Key No.)* § 289; *Cent. Dig.* §§ 652, 653.

<sup>51</sup> *Holt v. Allenbrand*, 52 Hun, 217, 4 N. Y. Supp. 922; *Kehoe v. Carville*, 84 Iowa, 415, 51 N. W. 166. But see *Roof v. Morrisson*, 37 Ill. App. 37; *American Linen Thread Co. v. Wortendyke*, 24 N. Y. 550. See "Partnership," *Dec. Dig. (Key No.)* § 291; *Cent. Dig.* §§ 657-660.

<sup>52</sup> *Young v. Tibbitts*, 32 Wis. 79. See "Partnership," *Dec. Dig. (Key No.)* § 291; *Cent. Dig.* §§ 657-660.

<sup>53</sup> *Clapp v. Upson*, 12 Wis. 492. See "Partnership," *Dec. Dig. (Key No.)* § 291; *Cent. Dig.* §§ 657-660.

<sup>54</sup> *Gage v. Rogers*, 51 Mo. App. 428. See "Partnership," *Dec. Dig. (Key No.)* § 291; *Cent. Dig.* §§ 657-660, 662.

which notice of dissolution was published has been held evidence to prove that he knew of such dissolution.<sup>55</sup>

It must be shown, however, that notice was actually received, and it has been held that though, on the mailing of a notice properly addressed, a presumption that it was received arises, such presumption may be rebutted by proof that it was not in fact received.<sup>56</sup>

<sup>55</sup> *Jenkins v. Blizard*, 1 Starkie, 418; *Rabe v. Wells*, 3 Cal. 148; *Whitesides v. Lee*, 2 Ill. 550. See "*Partnership*," *Dec. Dig. (Key No.)* § 291; *Cent. Dig.* §§ 657-660, 662.

<sup>56</sup> *Hunt v. Colorado Milling & Elevator Co.*, 1 Colo. App. 120, 27 Pac. 873; *Meyer v. Krohn*, 114 Ill. 574, 2 N. E. 495; *AUSTIN v. HOLLAND*, 69 N. Y. 571, 25 Am. Rep. 246, *Gilmore, Cas. Partnership*, 343.

"It is often difficult to determine what amounts to due and sufficient notice of the retirement of a partner, but the evidence to prove it should be such as would reasonably warrant the jury in finding the fact of notice, that the party to be charged with it actually had it, or might, by reasonable diligence, have learned of the dissolution of the partnership and the retirement of the partner sought to be charged, from the means and opportunity supplied or afforded for the purpose of giving notice of the same. Generally, the reasonableness of the notice will be a mixed question of law and fact, to be submitted to the jury under proper instructions of the court as to whether, under all the attending circumstances of the particular case, it was sufficient to warrant the inference of actual or constructive knowledge of the dissolution. As said above, ordinarily, notice fairly given in a newspaper, generally circulated abroad, and particularly among the business people of the town or city where the partnership carried on its business, would be sufficient as to all persons who had not had previous dealings with the partnership. It is better and safer to give notice in that way, although it might be given in other ways. This would afford business men reasonable opportunity to learn of the dissolution, and, in the course of business, the matter would be generally known, and more or less spoken of, to business men from every direction. But such publication must be fair and reasonable, as to its terms and the number of times it shall be made. If the facts are found or ascertained, the reasonableness and sufficiency of the notice may be a question of law for the court. The court must determine that there is, or is not, evidence sufficient to go to the jury to prove notice." *Merrimon, C. J.*, in *Ellison v. Sexton*, 105 N. C. 356, 361, 11 S. E. 180, 181, 18 Am. St. Rep. 907. See "*Partnership*," *Dec. Dig. (Key No.)* § 291; *Cent. Dig.* §§ 657-660, 662.

*Dormant Partner*

One who deals with a firm relies only on the credit of those who are the apparent members of it. A dormant partner not being an apparent member of the firm, it cannot be said that reliance is placed upon his credit. Hence, though he can be held, if discovered, on liabilities incurred by the firm while he was member of it,<sup>87</sup> he is not bound upon retiring to give notice of dissolution to escape liability for future obligations.<sup>88</sup> When a dormant partner becomes known to certain persons, he ceases to be dormant as to them, and must give them notice of his retirement from the firm.<sup>89</sup> If many learn that he is a partner, he is no longer a dormant partner, but an ostensible partner, and is bound to give such notice as is required of such partners.<sup>90</sup>

<sup>87</sup> See *Dormant Partners*, chapter II, § 39, p. 111.

<sup>88</sup> *CARTER v. WHALLEY*, 1 B. & Ad. 11; *Bigelow v. Elliot*, Fed. Cas. No. 1,399; *Nussbaumer v. Becker*, 87 Ill. 281, 29 Am. Rep. 53; *Ellis' Adm'rs v. Bronson*, 40 Ill. 455; *Scott v. Colmesnil*, 30 Ky. 416; *Magill v. Merrie*, 44 Ky. 168; *Edwards v. McFall*, 5 La. Ann. 167; *GROSVENOR v. LLOYD*, 1 Metc. (Mass.) 19, *Gilmore, Cas. Partnership*, 348; *Deford v. Reynolds*, 36 Pa. 325; *Vaccaro v. Toof*, 56 Tenn. 194. See "*Partnership*," *Dec. Dig. (Key No.)* § 289; *Cent. Dig.* § 654.

<sup>89</sup> *Farrar v. Deffinne*, 1 Car. & K. 580; *Park v. Wooten's Ex'rs*, 35 Ala. 242; *Warren v. Ball*, 37 Ill. 76; *Nussbaumer v. Becker*, 87 Ill. 281, 29 Am. Rep. 53; *Cregler v. Durham*, 9 Ind. 375; *Lieb v. Craddock*, 87 Ky. 525, 9 S. W. 838; *Davis v. Allen*, 3 N. Y. 168; *Milmo Nat. Bank v. Bergstrom*, 1 Tex. Civ. App. 151, 20 S. W. 836. See "*Partnership*," *Dec. Dig. (Key No.)* § 289; *Cent. Dig.* § 654.

<sup>90</sup> *ELMIRA IRON & STEEL ROLLING-MILL CO. v. HARRIS*, 124 N. Y. 280, 28 N. E. 541, *Gilmore, Cas. Partnership*, 349. See "*Partnership*," *Dec. Dig. (Key No.)* § 289; *Cent. Dig.* § 654.

## CHAPTER V

## POWERS OF PARTNERS

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## ORIGIN AND NATURE OF THE PARTNER'S POWER TO BIND THE FIRM

- 84.** The power of a partner to bind his firm in transactions with third persons is to be determined by the general principles of the law of agency. Each partner is the general agent of the partnership, with power to conduct its business in the usual way.

### *Origin and Nature of the Partner's Power—In General*

Whatever power a partner has, as to third persons, arises from the custom of merchants, which has attached to the partnership relation a doctrine of mutual agency. "This power is conferred by entering into the partnership, and is perhaps never to be found in the articles."<sup>1</sup> As the common law does not in terms recognize the firm as an entity, the partners are agents, not of the firm, but of one another. Each partner is both a principal and an agent. He is regarded as an agent of his copartners when he is acting, and as the principal of his copartners when they are acting. When he acts, he binds himself directly; he binds his associates by virtue of being their agent.<sup>2</sup> While the foregoing is the usual way of describing the agency involved in partnership, it is also described in another manner, on the assumption that the firm as an entity is the principal and each partner is an agent for this entity.<sup>3</sup> In their results, the decisions in reality recognize the firm as the principal.

<sup>1</sup> Marshall, C. J., in *WINSHIP v. BANK OF UNITED STATES*, 5 Pet. 529, 8 L. Ed. 216, Gilmore, Cas. Partnership, 356; *Alley v. Bowen-Merrill Co.* (1905) 76 Ark. 4, 88 S. W. 838, 113 Am. St. Rep. 73; *Standard Wagon Co. of Georgia v. D. P. Few & Co.*, 119 Ga. 293, 46 S. E. 109. See "*Partnership*," *Dec. Dig. (Key No.)* §§ 125, 126; *Cent. Dig.* §§ 190, 191.

<sup>2</sup> *Wehrman v. McFarlan*, 9 Ohio Dec. 400; *BROOKE v. WASHINGTON*, 8 Grat. (Va.) 248, 56 Am. Dec. 142, Gilmore, Cas. Partnership, 318; *BURGAN v. LYELL*, 2 Mich. 102, 55 Am. Dec. 53, Gilmore, Cas. Partnership, 358; *Edwards v. Tracy*, 62 Pa. 374; *Blodgett v. Weed*, 119 Mass. 215; *Fletcher v. Ingram*, 46 Wis. 191, 50 N. W. 424. See "*Partnership*," *Dec. Dig. (Key No.)* §§ 125, 126; *Cent. Dig.* §§ 190, 191.

<sup>3</sup> "Everybody knows that partnership is a sort of agency, but a

## POWERS OF PARTNERS INTER SE

85. The powers of partners inter se are governed by the agreement between them.

It is very common for the partners to stipulate among themselves for the sole management of the business or specific departments by one or more of the partners, or to limit the power of some of them to contract debts.<sup>4</sup> When, therefore, the rights of third persons are not involved, the scope of a partner's power is to be ascertained by the terms of the partnership agreement. In the absence of express mutual agreements defining the powers to be exercised by the partners, all have equal rights to the management of the firm business, and possess the ordinary powers incidental to such cases.<sup>5</sup>

very peculiar one. You cannot grasp the notion of agency, properly speaking, unless you grasp the notion of the existence of the firm as a separate entity from the existence of the partners; a notion which was well grasped by the old Roman lawyers, and which was partly understood in the courts of equity before it was part of the whole law of the land, as it is now. But when you get that idea clearly, you will see at once what sort of agency it is. It is the one person acting on behalf of the firm. He does not act as agent, in the ordinary sense of the word, for the others, so as to bind the others. He acts on behalf of the firm of which they are members; and as he binds the firm, and acts on the part of the firm, he is properly treated as the agent of the firm. If you cannot grasp the notion of a separate entity for the firm, then you are reduced to this: That inasmuch as he acts partly for himself and partly for the others, to the extent that he acts for the others he must be an agent, and in that way you get him to be an agent for the other partners, but only in that way, because you insist upon ignoring the existence of the firm as a separate entity." Per Jessel, M. R., in *POOLEY v. DRIVER*, 5 Ch. D. 458, Gilmore, Cas. Partnership, 380, note. See "*Partnership*," *Dec. Dig. (Key No.)* §§ 63, 125, 126; *Cent. Dig.* §§ 93, 190, 191.

<sup>4</sup> *Leavitt v. Peck*, 3 Conn. 125, 8 Am. Dec. 157; *Stone v. Wendover*, 2 Mo. App. 247. See "*Partnership*," *Dec. Dig. (Key No.)* §§ 70-91; *Cent. Dig.* §§ 114-138.

<sup>5</sup> *Lloyd v. Loaring*, 6 Ves. 773, 777; *Marshall v. Colman*, 2 Jac. & W. 286; *Goodman v. Whitcomb*, 1 Jac. & W. 589. See post,

## POWERS OF PARTNERS AS TO THIRD PERSONS

86. The powers of partners as to third persons consist (1) of the express authority derived from the partnership agreement; and (2) of the implied authority derived from the nature of the business, though not included in the partnership agreement.

### SAME—EXPRESS POWER

87. By express agreement authority may be conferred upon one partner to bind the firm by any act which would be binding if done by all the partners

By express agreement any power may be conferred upon a partner that could be lawfully exercised by all the partners, and the firm will be liable for any act of the partner done within such express authority, although the act seems to the third person to be beyond the apparent authority of the partner. At the same time the powers of a partner may be limited to any extent, but such limitations do not affect third persons who have no reason to know but what the restricted partner has all the usual powers of a partner agent.\*

### SAME—IMPLIED POWER

88. Unless his power is limited by the partnership agreement and this restriction is known to third persons, a partner has implied power to bind the firm by any act necessary and usual for carrying on its business in the ordinary manner.

chapter, VI, p. 362. Rights and Duties of Partners Inter Se. See "Partnership," *Dec. Dig. (Key No.)* §§ 70-91; *Cent. Dig.* §§ 114-138.

\* *Rice v. Jackson*, 171 Pa. 89, 32 Atl. 1036; *Stark v. Corey*, 45 Ill. 431; *Stimson v. Whitney*, 130 Mass. 591; *Tradesmen's Bank v. Astor*, 11 Wend. (N. Y.) 87. See post, § 90, p. 279, "Estoppel"; *Sladen, Fakes & Co. v. Lance*, 151 N. C. 492, 66 S. E. 449. See "Partnership," *Dec. Dig. (Key No.)* §§ 125-164; *Cent. Dig.* §§ 190-300.

It is very seldom that the partnership articles attempt to define all the rights and duties of a partner. "The articles of copartnership are, perhaps, never published. They are rarely, if ever, seen, except by the partners themselves. The stipulations they may contain are to regulate the conduct and rights of the parties as between themselves. The trading world, with whom the company is in perpetual intercourse, cannot individually examine these articles, but must trust to the general powers contained in all partnerships. \* \* \* If it is to be restrained, fair dealing requires that the restrictions should be made known. These stipulations may bind the partners, but ought not to affect those to whom they are unknown, and who trust to the general and well-established commercial law."<sup>7</sup> As we shall see in a later section, a partner has implied power to bind the firm within the scope of the partnership business, and most of his acts for his firm are done by virtue of this implied authority. When, therefore, he acts within its scope, he binds the firm, provided the person with whom he deals has no notice of any limitation upon such implied authority.<sup>8</sup> But, though the firm is bound in such a case to the third person, the partner so exceeding his authority is in turn liable to his copartners for any damage resulting from his breach of the agreement. Conversely, where the

<sup>7</sup> Marshall, C. J., in *WINSHIP v. BANK OF UNITED STATES*, 5 Pet. 529, 560, 8 L. Ed. 216, Gilmore, Cas. Partnership, 357. Authority to do acts necessary to carry on the business in the ordinary manner will be presumed. *Garth v. Davis & Johnson*, 120 Ky. 106, 85 S. W. 692, 117 Am. St. Rep. 571 (1905); *Boice v. Jones*, 86 App. Div. 613, 83 N. Y. Supp. 230; *Salt Lake City Brewing Co. v. Hawke*, 24 Utah, 199, 66 Pac. 1058. See "*Partnership*," *Dec. Dig. (Key No.)* §§ 125-164; *Cent. Dig.* §§ 190-300.

<sup>8</sup> See post, § 92, p. 282. See, also, *IRWIN v. WILLIAR*, 110 U. S. 499, 4 Sup. Ct. 160, 28 L. Ed. 225, Gilmore, Cas. Partnership, 363; *Hotckin v. Kent*, 8 Mich. 526; *Conely v. Wood*, 73 Mich. 203, 41 N. W. 259; *Krasky v. Wollpert*, 134 Cal. 338, 66 Pac. 309; *Morrison v. Austin State Bank*, 218 Ill. 472, 72 N. E. 1109, 104 Am. St. Rep. 225; *Woolsey v. Henke*, 125 Wis. 134, 103 N. W. 267 (1905); *Clark v. Ball*, 34 Colo. 223, 82 Pac. 529, 2 L. R. A. (N. S.) 100, 114 Am. St. Rep. 154; *Sladen, Fakes & Co. v. Lance*, 151 N. C. 492, 66 S. E. 449. See "*Partnership*," *Dec. Dig. (Key No.)* §§ 125-164; *Cent. Dig.* §§ 190-300.

third person has notice of the limitation upon the partner's authority, the firm is not bound.<sup>9</sup> This rule is again relaxed somewhat where the firm has acquired a usage or habit, affecting the apparent nature of its business, inconsistent with the strict limitations in the partnership agreement known to the third party.<sup>10</sup>

### SAME—RATIFICATION

**89. A subsequent ratification of a partner's act, done without authority, is equivalent to antecedent authority.**

Since the powers of partners are governed by the principles of agency, it follows that where authority is lacking for a partner's act it may be supplied by a subsequent ratification by the other partners.<sup>11</sup> The ratification may impose liability in either contract or tort; it may be express or implied. Thus in a recent case it was held that an unauthorized contract of purchase by one partner was ratified by the failure of the others to repudiate the contract before delivery of the goods.<sup>12</sup> Whether there has been a

<sup>9</sup> *Bailey v. Clark*, 6 Pick. (Mass.) 872; *Boardman v. Gore*, 15 Mass. 339; *Ensign v. Wands*, 1 Johns. Cas. (N. Y.) 171; *Wilson v. Richards*, 28 Minn. 337, 9 N. W. 872. See "*Partnership*," *Dec. Dig. (Key No.)* §§ 132, 133; *Cent. Dig.* §§ 196-199.

<sup>10</sup> *Woodward v. Winship*, 12 Pick. (Mass.) 430. See post, § 93, p. 286, "Limitation Arising from Nature of Business." See "*Partnership*," *Dec. Dig. (Key No.)* § 129; *Cent. Dig.* § 194.

<sup>11</sup> *MILLER v. ROYAL FLINT GLASS WORKS*, 172 Pa. 70, 33 Atl. 350; *Russell v. Annable*, 109 Mass. 72, 12 Am. Rep. 665; *Pacific Mut. Life Ins. Co. v. Fisher*, 109 Cal. 566, 42 Pac. 155; *Cassidy v. Saline County Bank*, 14 Okl. 532, 78 Pac. 324; *Guthiel v. Gilmer*, 27 Utah, 496, 76 Pac. 628; *Hatchett & Large v. Sunset Brick & Tile Co. (Tex. Civ. App.)* 99 S. W. 174 (1907); *Moran Bros. Co. v. Watson*, 44 Wash. 392, 87 Pac. 508 (1906); *Lee v. Kirby*, 80 Ark. 360, 97 S. W. 298. See "*Partnership*," *Dec. Dig. (Key No.)* § 157; *Cent. Dig.* §§ 282-291.

<sup>12</sup> *Hatchett & Large v. Sunset Brick & Tile Co. (Tex. Civ. App.)* 99 S. W. 174 (1907). See "*Partnership*," *Dec. Dig. (Key No.)* § 157; *Cent. Dig.* §§ 282-291.

ratification in any particular case is always a question of fact for the jury, and is to be determined according to the general rules of agency governing that subject.<sup>13</sup>

### SAME—ESTOPPEL

90. A partner, though acting in excess or abuse of his actual authority, may bind the firm as to third persons who bona fide rely on representations by word or deed of the other partners that such partner is acting within his authority, and who would sustain loss if the act were not considered that of the firm.

In addition to the liability of the partnership for acts done by a partner within his express or implied authority, or for unauthorized acts later ratified, a partner may bind the firm where authority in the usual sense does not exist at all, but where the other partners are estopped to deny the authority he has assumed. As in the law of agency, those who lead third persons to believe that certain authority exists will not be heard to deny the existence of that authority to the prejudice of those who relied upon it.<sup>14</sup> This principle was well applied in a recent case to hold a partnership to liability whose members negligently permitted one of them to put notes in circulation purporting on their face to be genuine and firm obligations, when in fact fraudulent and for the accommodation of others outside the partnership business.<sup>15</sup>

<sup>13</sup> *Stewart v. Brubaker*, 112 Ill. App. 408; *Cassidy v. Saline County Bank*, 14 Okl. 532, 78 Pac. 324; *Banner Tobacco Co. v. Jenison*, 48 Mich. 459, 12 N. W. 655. Mere silence is not a ratification per se. *First Nat. Bank v. State Nat. Bank*, 131 Fed. 422, 65 C. C. A. 406. See "*Partnership*," *Dec. Dig. (Key No.)* §§ 157, 218; *Cent. Dig.* §§ 282-291, 427.

<sup>14</sup> *Walsh v. Hartford Fire Ins. Co.*, 73 N. Y. 10; *Sheldon Hat Blocking Co. v. Elckemeyer Hat Blocking Mach. Co.*, 90 N. Y. 613. See, further, chapter I, § 21, p. 61. See "*Partnership*," *Dec. Dig. (Key No.)* §§ 155, 156; *Cent. Dig.* §§ 278-281.

<sup>15</sup> *Bank of Monongahela Valley v. Weston* (1902) 172 N. Y. 259, 64 N. E. 946. The principle is taken over from the law of agency,

**TEST OF AUTHORITY—NATURE OF QUESTION**

91. Where an express authority, ratification, or estoppel cannot be proved, the test of authority is what is reasonably and usually necessary to carry on the business in the ordinary way. This is generally a question of fact for the jury.

We have seen, in a preceding section, that a large part of a partner's powers must necessarily be implied; that he has implied power, unless a restriction upon his actual authority is known, to bind the firm by any act necessary and usual for carrying on its business in the ordinary way.<sup>16</sup> The very statement of the rule makes it clear that the important thing to be looked to is the necessity of the act in the particular case and in the particular business in which the firm is engaged.

The nature of the question is well stated in *Pooley et al. v. Whitmore*: "Every member of an ordinary partnership is its general agent for the transaction of its business in the ordinary way, and the firm is held responsible for whatever is done by any of its partners, when acting for the firm, within the limits of the authority conferred by the nature of the business it carries on. Every person is entitled to assume that each partner is empowered to do for the firm whatever is necessary for the transaction of its business, in the way in which that business is ordinarily carried on by other people. But no person is entitled to assume that any partner has more extensive authority than that above described. It will be observed that what is nec-

as laid down in *New York & N. H. R. Co. v. Schuyler*, 34 N. Y. 58. See, also, *Jamison v. Charles F. Cullom & Co.*, 110 La. 781, 34 South. 775. See "*Partnership*," *Dec. Dig. (Key No.)* §§ 155, 156; *Cent. Dig.* §§ 278-281.

<sup>16</sup> See ante, § 88, p. 276. The implied or apparent authority of a partner is limited to acts which are reasonably necessary for carrying on the business in the ordinary way. *Kelley-Goodfellow Shoe Co. v. Long-Bell Lumber Co.*, 86 Mo. App. 438; *Standard Wagon Co. of Georgia v. D. P. Few & Co.*, 119 Ga. 293, 46 S. E. 109. See "*Partnership*," *Dec. Dig. (Key No.)* §§ 125-164; *Cent. Dig.* §§ 190-300.

essary to carry on the partnership business in the ordinary way is made the test of an authority when no actual authority or ratification can be proved. \* \* \* The question whether a given act can or cannot be necessary to the transaction of the business in the way in which it is usually carried on must evidently be determined by the nature of the business and by the practice of persons engaged in it. Evidence on both of these points is necessarily admissible, and, as readily may be conceived, an act which is necessary for the prosecution of one kind of business may be wholly unnecessary for the carrying on of another in the ordinary way. Consequently no answer of any value can be given to the abstract question, Can one partner bind his firm by such an act? unless, having regard to what is usual in business, it can be predicated of the act in question, either that it is one without which no business can be carried on, or that it is one which is not necessary for carrying on any business whatever. There are obviously very few acts of which such an affirmation can be truly made. The great majority of acts which give rise to doubt are those which are necessary in one business and not in another."<sup>17</sup> Moreover, the act must be reasonably necessary, if the power to do it is to be implied. The mere fact that it is convenient, or that it facilitates the transaction of the firm business, is not enough.<sup>18</sup> Nor, going to the other extreme, has a partner implied power to do an act, however necessary, even to save the business, if the act is in any sense unusual, or the necessity an "extraordinary" one. Reasonable necessity is the criterion of authority.<sup>19</sup> Whether the act in question

<sup>17</sup> POOLEY v. WHITMORE, 10 Heisk. (Tenn.) 633, 27 Am. Rep. 733, Gilmore, Cas. Partnership, 360; IRWIN v. WILLIAR, 110 U. S. 490, 4 Sup. Ct. 160, 28 L. Ed. 225, Gilmore, Cas. Partnership, 363. See post, §§ 92, 93, pp. 282, 286, "Limitations Arising from Scope and Nature of Business." See "Partnership," Dec. Dig. (Key No.) §§ 125-164; Cent. Dig. §§ 190-300.

<sup>18</sup> Dickinson v. Valpy, 10 Barn. & C. 128; Ricketts v. Bennett, 4 C. B. 686; Mason v. Gibson, 73 N. H. 190, 60 Atl. 96. See "Partnership," Dec. Dig. (Key No.) §§ 125-164; Cent. Dig. §§ 190-300.

<sup>19</sup> Hawtayne v. Burne, 7 Mees. & W. 595; Russell v. Annable, 109 Mass. 72, 12 Am. Rep. 665; Barnard v. Lapeer & P. H. Plank Road Co., 6 Mich. 274; Cotzhausen v. Judd, 43 Wis. 213, 28 Am. Rep. 530;

is reasonably necessary to carry on the business in the ordinary way is, of course, generally a question of fact for the jury.<sup>10</sup>

### SAME—LIMITATIONS ARISING FROM SCOPE OF BUSINESS

**92.** Unless express authority, ratification, or an estoppel is shown, a partner has no authority to bind his co-partners in a matter which is beyond the scope of the partnership business.

By the acts of the firm all the partners are bound; and all acts done by a partner on behalf of the firm within the scope of its business are acts of the firm.<sup>21</sup> The phrase "scope of the business" means whatever is usually done by persons engaged in a similar business in the ordinary manner at the same time and place.<sup>22</sup> The scope of the busi-

Morse v. Richmond, 97 Ill. 810; Mason v. Gibson, 73 N. H. 190, 60 Atl. 96. See "Partnership," *Dec. Dig. (Key No.)* §§ 125-164; *Cent. Dig.* §§ 190-300.

<sup>20</sup> Beckwith v. Mace (1905) 140 Mich. 157, 103 N. W. 559; Hefferlin v. Karlman, 29 Mont. 139, 74 Pac. 201; POOLEY v. WHITMORE (1873) 10 Heisk. (Tenn.) 633, 27 Am. Rep. 733, Gilmore, *Cas. Partnership*, 360.

"Dealing in grain is not a technical phrase, from which a court can properly infer as matter of law authority to bind the firm in every case, irrespective of its circumstances; and if, by usage, it has acquired a fixed and definite meaning, as a word of art in trade, that is matter of fact to be established by proof found by a jury." IRWIN v. WILLIAR, 110 U. S. 499, 4 Sup. Ct. 160, 28 L. Ed. 225, Gilmore, *Cas. Partnership*, 363. See "Partnership," *Dec. Dig. (Key No.)* § 218; *Cent. Dig.* § 427.

<sup>21</sup> Eastman v. Cooper, 15 Pick. (Mass.) 276, 26 Am. Dec. 600; Livingston v. Roosevelt, 4 Johns. (N. Y.) 251, 4 Am. Dec. 273; Mercen v. Andrus, 10 Wend. (N. Y.) 461; Beardsley v. Tuttle, 11 Wis. 74; Bank of Ft. Madison v. Alden, 129 U. S. 372, 9 Sup. Ct. 332, 32 L. Ed. 725. See "Partnership," *Dec. Dig. (Key No.)* §§ 125-164; *Cent. Dig.* §§ 190-300.

<sup>22</sup> IRWIN v. WILLIAR, 110 U. S. 499, 4 Sup. Ct. 160, 28 L. Ed. 225, Gilmore, *Cas. Partnership*, 363; Seaman v. Ascherman, 57 Wis. 547, 15 N. W. 788; Lynch v. Hillstrom, 64 Minn. 521, 67 N. W. 636;

ness may be set forth in the articles of partnership. More likely, however, it will be ascertained by considering the usual course of similar businesses as usually carried on.<sup>23</sup> This is a question of fact,<sup>24</sup> especially in a new business. In an old and well-known business the scope is determined as a matter of law.<sup>25</sup> If the scope of the business as defined by the articles of partnership is actually observed by the partners, then third persons who have notice thereof cannot hold the partnership on contracts beyond the scope.<sup>26</sup>

*Banner Tobacco Co. v. Jenison*, 48 Mich. 459, 12 N. W. 655. See "*Partnership*," *Dec. Dig. (Key No.)* §§ 125-164; *Cent. Dig.* §§ 190-300.

<sup>23</sup> The scope of the firm business is determined "according to the usual and ordinary course in which it is carried on by those engaged in it in the locality which is its seat, or as reasonably necessary or fit for its successful prosecution. If it cannot be found in that, it may still be inferred from the actual, though exceptional, course and conduct of the business of the partnership itself, as personally carried on with the knowledge, actual or presumed, of the partner sought to be charged." *IRWIN v. WILLIAR*, 110 U. S. 499, 4 Sup. Ct. 160, 28 L. Ed. 225, *Gilmore, Cas. Partnership*, 363. See "*Partnership*," *Dec. Dig. (Key No.)* §§ 125-164; *Cent. Dig.* §§ 190-300.

<sup>24</sup> "What the nature of that business in each case is, what is necessary and proper to its successful prosecution, what is involved in the usual and ordinary course of its management by those engaged in it, at the place and time where it is carried on, are all questions of fact to be decided by the jury, from a consideration of all the circumstances which, singly or in combination, affect its character or determine its peculiarities; and from them all, giving to each its due weight, it is its (the jury's) province to ascertain and say whether the transaction in question is one which those dealing with the firm had reason to believe was authorized by all of its members." *Civ. Code Cal.* § 2429; *IRWIN v. WILLIAR*, 110 U. S. 499, 4 Sup. Ct. 160, 28 L. Ed. 225, *Gilmore, Cas. Partnership*, 363. See "*Partnership*," *Dec. Dig. (Key No.)* § 218; *Cent. Dig.* § 427.

<sup>25</sup> *ALSOP v. CENTRAL TRUST CO.*, 100 Ky. 375, 38 S. W. 510, *Gilmore, Cas. Partnership*, 365, note; *Walcott v. Canfield*, 3 Conn. 194; *Wells v. Turner*, 16 Md. 133; *DAVIS v. DODSON*, 95 Ga. 718, 22 S. E. 645, 29 L. R. A. 496, 51 Am. St. Rep. 108. See "*Partnership*," *Dec. Dig. (Key No.)* §§ 125-164, 218; *Cent. Dig.* §§ 190-300, 427.

<sup>26</sup> *Aultman & Taylor Co. v. Shelton*, 90 Iowa, 288, 57 N. W. 857; *Harper v. McKinnis*, 53 Ohio St. 434, 42 N. E. 251; *Enterprise Oil & Gas Co. v. National Transit Co.*, 172 Pa. 421, 33 Atl. 687, 51 Am.

If, however, the scope of the business is to be ascertained by the usual course of similar business, third parties must take notice of the limitations which usually exist, and cannot hold the firm on contracts outside the usual course of business.<sup>27</sup> If a partner, like any other agent, does an act for a purpose which is clearly not connected with the firm's ordinary scope of business, he is not acting in pursuance of any apparent authority. The only way to charge the firm, therefore, is to prove that he had actual authority to do the act.<sup>28</sup> For example, an agreement by one member of a law firm to collect a note without charge is not binding on the copartners, as gratuitous undertakings are clearly not within the scope of the business of such a firm.<sup>29</sup> Further, if a partner pledges the credit of a firm, without authority, to pay his own private debts, to one who knows or has reason to know they are private debts, the firm is not liable.<sup>30</sup> But, even as against the other partners, an act of a partner for his own exclusive benefit may be binding on the firm, where there was nothing which ought to have put a reasonable person on his guard as to the true nature of the transac-

St. Rep. 746; *Kling v. Tunstall*, 109 Ala. 608, 19 South. 907. See "Partnership," *Dec. Dig. (Key No.)* §§ 125-164; *Cent. Dig.* §§ 190-300.

<sup>27</sup> *Taylor v. Thompson*, 62 App. Div. 159, 70 N. Y. Supp. 997; *Id.* 74 App. Div. 320, 77 N. Y. Supp. 438, affirmed 176 N. Y. 168, 68 N. E. 240; *Beatty v. Bulger*, 28 Tex. Civ. App. 117, 66 S. W. 893; *Eady v. Newton Coal & Lumber Co.*, 123 Ga. 557, 51 S. E. 661, 1 L. R. A. (N. S.) 650. See "Partnership," *Dec. Dig. (Key No.)* §§ 125-164; *Cent. Dig.* §§ 190-300.

<sup>28</sup> *Standard Wagon Co. of Georgia v. D. P. Few & Co.*, 119 Ga. 293, 46 S. E. 109; *Livingston v. Roosevelt*, 4 Johns. (N. Y.) 251, 4 Am. Dec. 273. See "Partnership," *Dec. Dig. (Key No.)* §§ 125-164; *Cent. Dig.* §§ 190-300.

<sup>29</sup> *DAVIS v. DODSON*, 95 Ga. 718, 22 S. E. 645, 29 L. R. A. 496, 51 Am. St. Rep. 108. See "Partnership," *Dec. Dig. (Key No.)* § 139; *Cent. Dig.* § 206.

<sup>30</sup> *Leveson v. Lane*, 13 O. B. (N. S.) 278; *Snaith v. Burrldge*, 4 Taunt. 684. See, also, generally, *Taylor v. Thompson*, 62 App. Div. 159, 70 N. Y. Supp. 997; *Id.*, 74 App. Div. 320, 77 N. Y. Supp. 438, affirmed 176 N. Y. 168, 68 N. E. 240; *Eady v. Newton Coal & Lumber Co.*, 123 Ga. 557, 51 S. E. 661, 1 L. R. A. (N. S.) 650, and note; *Alley v. Bowen-Merrill Co.*, 76 Ark. 4, 88 S. W. 838, 113 Am. St. Rep. 73 (1905). See "Partnership," *Dec. Dig. (Key No.)* § 144; *Cent. Dig.* §§ 234-239.

tion.<sup>81</sup> If a partner makes a contract necessary for the conduct of the partnership business in the ordinary way, the firm will be liable, unless the partner had in fact no authority to bind the firm, and the person dealing with him was aware of that want of authority; but if the contract was not necessary for the conduct of the partnership business in the ordinary way the firm will not be liable, unless an authority to do the act in question, or some ratification of it, can be shown to have been conferred or made by the other partners.<sup>82</sup>

*Enlargement of Scope or Nature of Business by Subsequent Conduct*

It may sometimes happen that the original scope of a partnership business will be enlarged by the actual or implied consent of all the partners, and what was originally a nontrading partnership be converted into a trading firm, with the consequent enlargement of the implied powers of the individual partners. This was well illustrated in a case where partners engaged in the printing business had gradually added piano selling to their activities; the court holding that the power of each partner to bind the firm had now become coextensive with the whole business of the firm. Where formerly he could do only acts necessary and proper to the conduct of nontrading printing business, he could

<sup>81</sup> *Union Nat. Bank of Kansas City, Mo., v. Neill*, 149 F. 711, 79 C. C. A. 417, 10 L. R. A. (N. S.) 426; *Fox v. Clemmons* (Ky.) 99 S. W. 641; *Dunnett & Slack v. Gibson*, 78 Vt. 439, 63 Atl. 141; *Rice v. Jackson*, 171 Pa. 89, 32 Atl. 1036; *WINSHIP v. BANK OF UNITED STATES*, 5 Pet. 529, 8 L. Ed. 216, *Gilmore, Cas. Partnership*, 356; *Nat. Bank of Virginia v. Cringan*, 91 Va. 347, 21 S. E. 820. A member of a firm engaged in the cattle commission business has authority to enter into an agreement whereby a bank is to furnish a customer money to purchase cattle with, in consideration that the firm accept drafts drawn on it to the extent of the net proceeds of the cattle shipped to it. *First Nat. Bank of Pipestone v. Rowley*, 92 Iowa, 530, 61 N. W. 195. See "*Partnership*," *Dec. Dig. (Key No.)* §§ 125-164; *Cent. Dig.* §§ 190-300.

<sup>82</sup> *Crellin v. Brook*, 14 Mees. & W. 11; *Dickinson v. Valpy*, 10 Barn. & C. 128; *Walden v. Sherburne*, 15 Johns. (N. Y.) 422. See, also, ante, §§ 91, 92, pp. 280, 282. See "*Partnership*," *Dec. Dig. (Key No.)* §§ 125-164; *Cent. Dig.* §§ 190-300.

now exercise, in addition, the powers of a partner in a piano selling, i. e., a trading, firm.<sup>83</sup>

### **SAME—LIMITATIONS ARISING FROM NATURE OF BUSINESS**

**93.** The scope of the firm business, and the extent to which each partner is to be regarded as the implied agent of the firm in his dealings with strangers, also depend upon the general nature of the firm business.

We have already seen that a partner has power to do that which is reasonably necessary to carry on the business of the firm in the ordinary way, but no power to act beyond the scope of its business.<sup>84</sup> Obviously the scope of a firm's business, and the ordinary way of carrying it on, will vary according to the nature of that business. An act which is common and proper in the conduct of a grocery business may not be required at all in the business of a firm of contractors and builders, and third persons must take notice of that fact.<sup>85</sup>

#### *Trading and Nontrading Partnerships*

In any classification of partnerships with respect to the nature of their business, the most obvious distinction is between trading and nontrading partnerships, of which something has already been said, and more will be said later.<sup>86</sup>

<sup>83</sup> Boardman v. Adams, 5 Iowa, 224. See "Partnership," Dec. Dig. (Key No.) §§ 125-164; Cent. Dig. §§ 190-300.

<sup>84</sup> Ante, §§ 88, 92, pp. 276, 282.

<sup>85</sup> Where a partnership is limited to a particular trade or business, one partner cannot bind his copartner by any contract not relating to such trade or business, and third persons will be presumed to have knowledge of the limited nature of the partnership from circumstances connected with the business of the firm. Livingston v. Roosevelt (1809) 4 Johns. (N. Y.) 251, 4 Am. Dec. 273, 1 Am. Lead. Cas. 507, and note. See "Partnership," Dec. Dig. (Key No.) §§ 125-164; Cent. Dig. §§ 190-300.

<sup>86</sup> See ante, chapter II, §§ 37, 38, p. 107, and post, chapter V, § 100, p. 302.

The distinction between trading and nontrading partnerships is, in this connection, a difference in the powers of the partners. In a trading firm, each partner has implied power to borrow money and to give the firm paper therefor. In a nontrading firm, no such implied power exists. That the members of a nontrading partnership have not the same extent of authority to bind the other members is so only because the scope of business of such firms is not so wide as that of trading partnerships; and where the act of a partner is within the scope of the firm's business, a member of a nontrading partnership may bind his copartners just as truly as can members of a trading partnership.<sup>27</sup> Originally, in both trading and nontrading partnerships, the question whether an act of a partner was necessary and proper for the particular business was purely one of fact for the jury.<sup>28</sup> This is probably still true of new business, and of old businesses conducted in an exceptional manner. But the great mass of ordinary, every-day transactions in trading partnerships have become usages recognized by the courts, and are now treated either as questions of fact for the court or as pure questions of law.<sup>29</sup>

<sup>27</sup> *Alley v. Bowen-Merrill Co.* (1905) 76 Ark. 4, 88 S. W. 838, 113 Am. St. Rep. 73; *Lee v. First Nat. Bank of Ft. Scott*, 45 Kan. 8, 25 Pac. 196, 11 L. R. A. 238; *PEASE v. COLE*, 53 Conn. 53, 22 Atl. 681, 55 Am. Rep. 53; *Gilmore, Cas. Partnership*, 872. See "*Partnership*," *Dec. Dig. (Key No.)* §§ 125-164; *Cent. Dig.* §§ 190-300.

<sup>28</sup> *IRWIN v. WILLIAR*, 110 U. S. 499, 4 Sup. Ct. 160, 28 L. Ed. 225, *Gilmore, Cas. Partnership*, 363. See "*Partnership*," *Dec. Dig. (Key No.)* § 218; *Cent. Dig.* § 427.

<sup>29</sup> "The partnership (in farming) in this case is not a trading or commercial one, which is generally governed as to its scope of authority by the rules of the law merchant, of which the courts take judicial cognizance. The principle governing a nontrading partnership is well settled. There are three classes of cases where each partner connected with such associations may lawfully bind the firm; the burden, in each case, being on the plaintiff to prove the facts by which such authority is established, or from which it may be implied: (1) Where he has express authority to do so; (2) where the contract made, or thing done, is necessary in order to carry on the business of the partnership; and (3) where it is usually or customarily incident to the partnerships of like nature." *Woodruff v. Scaife*, 83 Ala. 152, 3 South. 311. See, also, *Pollock's Digest of Part.*

### PARTICULAR POWERS CONSIDERED—POWER TO SELL FIRM PROPERTY

94. Each partner has implied power to sell any specific part of the partnership personalty, tangible and intangible, which is held for the purpose of sale, so as to pass the entire title to the purchaser.
95. Where a firm is organized to deal in real estate, or where a firm holds real estate for sale, each partner has implied power to enter into a contract for the sale of the same; but, where a deed under seal is required to convey the legal title, power to execute such an instrument is not implied, but must be expressly conferred.

While the question whether a particular act is within the power of a partner must depend largely upon the facts of each case, there are certain powers which usually accompany ordinary partnerships. Some of these powers will now be considered.

#### *Power to Sell Personal Property of the Firm*

In an earlier chapter there was an extended discussion of the transfer of firm property in general, the purposes for which it might be transferred, and the form of the transfer, always assuming the existence of a partner's power so to transfer.<sup>40</sup>

As stated in the black letter proposition above, each partner has the general power of sale of the property of the firm held for sale, and "the sale of one partner is the sale of

(5th Ed.) 27; *Farmer v. Bank of Wickliffe*, 51 S. W. 586, 21 Ky. Law Rep. 425.

"In a commercial partnership the extent of a partner's power to bind the firm is a question of law, while in the noncommercial firm the power of one partner to bind his copartner is a question of fact." *ALSOP v. CENTRAL TRUST CO.* (1897) 100 Ky. 375, 38 S. W. 510, Gilmore, Cas. Partnership, 385, note. See "*Partnership*," *Dec. Dig. (Key No.)* § 218; *Cent. Dig.* § 427.

<sup>40</sup> Ante, chapter III, §§ 56-64, pp. 176-203.

both."<sup>41</sup> It was formerly broadly stated that a partner might sell all the partnership personalty at one time, and thus terminate the partnership.<sup>42</sup> The tendency of the modern cases, however, is to limit the implied power of sale to the property which is held for the purpose of sale, and not to include the property kept for the purpose of carrying on the business. Thus one of a firm of farmers has no implied authority to sell the domestic animals bought for and used in cultivating the farm.<sup>43</sup>

Like all other implied powers of partners, the power of sale depends upon the general nature of the partnership business. Obviously one of a firm of lawyers would not have the same power to dispose of the partnership library that one of a firm of grocers would have to sell goods of its stock. Also, one member of a partnership formed for the increase and improvement of a flock of sheep has no implied power to sell the entire flock, where the purpose of the partnership is brought home to the purchaser.<sup>44</sup>

The power to transfer firm personalty includes also the

<sup>41</sup> LAMBERT'S CASE, Godb. 244, Gilmore, Cas. Partnership, 230. See "Partnership," Dec. Dig. (Key No.) §§ 138, 141; Cent. Dig. §§ 217-221.

<sup>42</sup> Lamb v. Durant, 12 Mass. 54, 7 Am. Dec. 31; TAPLEY v. BUTTERFIELD, 1 Metc. (Mass.) 515, 35 Am. Dec. 374; Arnold v. Brown, 24 Pick. (Mass.) 89, 35 Am. Dec. 296; Graser v. Stellwagen, 25 N. Y. 315; Mabbett v. White, 12 N. Y. 442. See "Partnership," Dec. Dig. (Key No.) §§ 141, 269; Cent. Dig. §§ 220, 613.

<sup>43</sup> Cayton v. Hardy, 27 Mo. 536. See, also, Blaker v. Sands, 29 Kan. 551; SLOAN v. MOORE, 37 Pa. 217, Gilmore, Cas. Partnership, 231; Hunter v. Waynick, 67 Iowa, 555, 25 N. W. 776; Lowman v. Sheets, 124 Ind. 417, 24 N. E. 351, 7 L. R. A. 784; Wilcox v. Jackson, 7 Colo. 521, 4 Pac. 966. On sale of entire property of firm operating to discontinue the firm business, see, also, Doll v. Hennessy Co. (1905) 33 Mont. 80, 81 Pac. 625, holding it immaterial that the purchase price was applied to the liquidation of firm debts. If a partner sell all the firm property, he acts beyond the scope of the partnership business. Bender v. Hemstreet, 12 Misc. Rep. 620, 34 N. Y. Supp. 423. A partner has no power, as such, to sell the good will of the partnership business. Kelly v. Pierce (1907) 16 N. D. 234, 112 N. W. 995, 12 L. R. A. (N. S.) 180. See "Partnership," Dec. Dig. (Key No.) §§ 138, 141; Cent. Dig. §§ 217-221.

<sup>44</sup> Blaker v. Sands, 29 Kan. 551. See "Partnership," Dec. Dig. (Key No.) §§ 138, 141; Cent. Dig. §§ 217-221.

power to transfer negotiable instruments and all other tangible property belonging to the firm.<sup>45</sup> And as an agent with power to sell has implied power to warrant quality or soundness, so has the partner who sells firm property.<sup>46</sup>

*Sale by Single Partner of Firm Property to Pay Separate Debts—As Against Ostensible Partners*

A partner has no authority to use firm property to pay individual debts. If he does so, the creditor can be compelled to pay the partnership, even though he supposed that the payment was made with individual property. Thus, in *Janney v. Springer*,<sup>47</sup> the defendants were creditors of A. A. Paine, of the firm of A. A. Paine & Co., on a promissory note, and bought goods belonging to the firm from Paine on condition that the price of the goods should be applied on the note. They did not know that the goods were firm goods, nor that the plaintiff, Janney, was in partnership with Paine. It was held that the defendants were liable for the goods so bought; the court saying: "It is said there was no firm sign erected at the place of business of the partnership, and that defendants had no knowledge of the existence of the firm. This want of knowledge and omission to use a sign was in no sense conflicting evidence upon the question of a partnership in fact. It having been established beyond question that the deed was partnership property, it was incumbent on the defendants to show that Janney in some way assented to the alleged agreement to pay

<sup>45</sup> *George v. Tate*, 102 U. S. 564, 28 L. Ed. 232; *First National Bank of Negaunee v. Freeman*, 47 Mich. 408, 11 N. W. 219; *Gerli v. Poldebard Silk Mfr. Co.*, 57 N. J. Law, 432, 31 Atl. 401, 30 L. R. A. 61, 51 Am. St. Rep. 611. See "*Partnership*," *Dec. Dig. (Key No.)* §§ 138, 146; *Cent. Dig.* §§ 217-221, 251-252.

<sup>46</sup> *Sweet v. Bradley*, 24 Barb. (N. Y.) 549; *HUBBARD v. GALUSHA*, 23 Wis. 398; *Sandilands v. Marsh*, 2 B. & Ald. 673, at page 679. A partner in a contracting and building firm has implied authority to warrant the durability of materials and workmanship in constructing a building. *Powell v. Flowers & McPhail*, 151 N. C. 140, 65 S. E. 817. See "*Partnership*," *Dec. Dig. (Key No.)* §§ 138, 141; *Cent. Dig.* § 221.

<sup>47</sup> *JANNEY v. SPRINGER*, 78 Iowa, 617, 43 N. W. 461, 16 Am. St. Rep. 460, *Gillmore*, Cas. *Partnership*, 243. See "*Partnership*," *Dec. Dig. (Key No.)* § 144; *Cent. Dig.* § 236.

the individual debt of Paine in partnership property, or that he (Janney) in some way ratified the act after it was done."<sup>48</sup> It is sometimes said, however, that if the partner's separate creditor takes in ignorance of the firm title he may keep the property. *Locke v. Lewis*<sup>49</sup> is cited for the proposition, but an examination of the facts of that case would seem to establish an estoppel.<sup>50</sup>

*Same—As Against Dormant Partners*

If, however, one intentionally conceals the fact of his membership in a firm from the world, he has no right to complain if those who deal with the ostensible partner as an individual offset firm demands with debts due from the individual.<sup>51</sup> Nor can he assert his right in firm goods as against those who have extended credit on the faith of the individual ownership of the ostensible partner.<sup>52</sup>

<sup>48</sup> *Farris v. Morrison*, 66 Ark. 318, 50 S. W. 603; *BRICKETT v. DOWNS*, 163 Mass. 70, 39 N. E. 776; *HARTLEY v. WHITE*, 94 Pa. 31, Gilmore, Cas. Partnership, 245; *Todd v. Lorah*, 75 Pa. 155; *Rogers v. Batchelor*, 12 Pet. 221, 9 L. Ed. 1063.

One who knowingly receives partnership property with knowledge that its proceeds are passing to the individual use of one partner is charged with notice of such partner's want of authority to dispose of the property for his individual benefit. *COLUMBIA NAT. BANK OF LINCOLN v. RICE*, 48 Neb. 428, 67 N. W. 165. But see *Grover v. Smith*, 165 Mass. 132, 42 N. E. 555, 52 Am. St. Rep. 506, holding that where a partner sells firm goods under an agreement that one-fourth of the price should be applied in a private debt owed by the partner to the purchaser, the firm cannot recover such one-fourth. A fair sale made in good faith to an existing bona fide creditor by one partner, without the consent of the other, may, where the purchaser has notice of such want of consent, be questioned by the nonassenting partner, but is good as to all third persons. *Klemm v. Bishop*, 56 Ill. App. 613. See "*Partnership*," *Dec. Dig. (Key No.)* § 144; *Cent. Dig.* §§ 234-239.

<sup>49</sup> *LOCKE v. LEWIS*, 124 Mass. 1, 26 Am. Rep. 631. See "*Partnership*," *Dec. Dig. (Key No.)* § 144; *Cent. Dig.* §§ 234-239.

<sup>50</sup> See *Burdick on Partnership* (2d Ed.) pp. 129, 130, for a criticism of the case.

<sup>51</sup> *BRYANT v. CLIFFORD*, 27 Vt. 664, Gilmore, Cas. Partnership, 246; *SWAN v. STEELE*, 7 East, 210; *Willey v. Crocker-Woolworth Nat. Bank*, 141 Cal. 508, 75 Pac. 106. See "*Partnership*," *Dec. Dig. (Key No.)* § 164; *Cent. Dig.* § 300.

<sup>52</sup> *Swofford Bros. Dry Goods Co. v. Diment*, 132 Mo. App. 616, 111

*Same—Sale of Partnership Realty*

It is said that a partner has no implied authority to sell firm realty. This absence of authority may be due to the fact that real estate is not ordinarily the subject-matter of a partnership and is not usually included in the property held for sale. As the implied power of a partner to sell usually extends only to those things held for sale, it would not include firm real estate. But in so-called real estate partnerships, where land is the commodity dealt in, it would seem that there should be implied power in each partner to sell it. Further, the lack of authority may be explained by the nature of the instrument required to effect a transfer of real estate. Usually this can be done only by deed under seal. As pointed out,<sup>53</sup> a partner has no implied authority to execute a sealed instrument, and therefore, it is said, no power to sell the firm realty. But a distinction should be drawn between the actual conveyance of firm realty and a contract to convey. It might very well be that a partner has power to bind the firm by an agreement to convey partnership land, but has not the power to execute the formal conveyance.<sup>54</sup> Distinguishing, therefore, between a contract to sell and the actual conveyance of the firm realty, the question whether a partner has implied power to bind his copartner with respect to firm realty will depend upon the position which such real estate occupies in the firm assets and upon the nature of the firm business. If land is a part of the partnership stock, and is a commodity held for sale, then there should be implied power in each partner to make binding contracts to sell it.<sup>55</sup>

S. W. 1196. See "*Partnership*," *Dec. Dig. (Key No.)* § 164; *Cent. Dig.* § 300.

<sup>53</sup> See post, § 101, p. 308, "Power to Execute Sealed Instruments," and ante, chapter III, § 63, p. 196, "Form of Transfer." The general implied powers of a partner do not extend to binding the firm by seal. *Arnold v. Stevenson*, 2 Nev. 234; *Foster's Appeal*, 74 Pa. 391, 15 Am. Rep. 553. See "*Partnership*," *Dec. Dig. (Key No.)* §§ 138, 141; *Cent. Dig.* §§ 217-221.

<sup>54</sup> *Bates, Partnership*, § 299.

<sup>55</sup> *CHESTER v. DICKERSON*, 54 N. Y. 1, 13 Am. Rep. 550, *Gilmore, Cas. Partnership*, 136; *Thompson v. Bowman*, 6 Wall. 316, 18 L. Ed. 736; *Sage v. Sherman*, 2 N. Y. 417; *Robinson v. Crowder*,

Authorities recognizing such implied power often do so on the ground that partnership realty is treated in equity as personalty, and therefore each partner in a real estate firm has implied power to sell it, and equity will decree specific performance of contracts made pursuant to such authority.<sup>66</sup> If, on the other hand, land is held as a mere incident to the firm business, or as one of the things used in the prosecution of the main enterprise, such as the site on which the partnership activities are conducted, then there should be no implied power to contract to sell it.<sup>67</sup>

*Same—Firm Title in Name of One Partner*

It is possible, however, that a firm, by permitting the title to firm realty to stand in the name of one partner, may estop itself from claiming against a bona fide purchaser or mortgagee from such partner; but, if the purchaser knows

4 McCord (S. C.) 519, 536-537, 17 Am. Dec. 762; *Batty v. Adams Co.*, 16 Neb. 44, 20 N. W. 15; *Baldwin v. Richardson*, 33 Tex. 16.

In *Thompson v. Bowman*, *supra*, it is said: "There is no doubt that a copartnership may exist in the purchase and sale of real property, equally as in any other lawful business. Nor is there any doubt that each member of such copartnership possesses full authority to contract for the sale or other disposition of its entire property, though for technical reasons the legal title vested in all the copartners can only be transferred by their joint act." See "*Partnership*," *Dec. Dig. (Key No.)* §§ 138, 141; *Cent. Dig.* §§ 217-221.

<sup>66</sup> In *ROVELSKY v. BROWN*, 92 Ala. 522, 5 South. 182, 25 Am. St. Rep. 83, *Gilmore, Cas. Partnership*, 239, specific performance was granted of a contract to convey firm real estate, made by one partner in a firm engaged in buying and selling realty.

See, also, *Moderwell v. Mullison*, 21 Pa. 257; *Ludlow's Heirs v. Cooper's Devisees*, 4 Ohio St. 1; *Olcott v. Wing*, 4 McLean, 15, Fed. Cas. No. 10,481; *Pugh's Heirs v. Currie*, 5 Ala. 446.

See, further, post, § 101, p. 308, on the "Power to Execute Sealed Instruments." See "*Partnership*," *Dec. Dig. (Key No.)* §§ 138, 141; *Cent. Dig.* §§ 217-221.

<sup>67</sup> *Ruffner v. McConnel*, 17 Ill. 212, 63 Am. Dec. 362; *TAPLEY v. BUTTERFIELD*, 1 Metc. (Mass.) 515, 35 Am. Dec. 374; *Judge v. Braswell*, 13 Bush (Ky.) 69, 26 Am. Rep. 185.

Even in jurisdictions which deny the authority to sell the firm real estate, it is held that if the conveyance is made in the presence of all the partners and with their consent, or is ratified by them, it will pass the title. *Ferguson v. Hanauer*, 56 Ark. 179, 19 S. W. 749; *Little v. Hazzard*, 5 Har. (Del.) 291; *Haynes v. Seachrest*, 13 Iowa, 455; *Weld v. Peters*, 1 La. Ann. 432; *Shirley v. Fearn*, 33 Miss.

the property is firm property, he is presumed to know that the partner having the legal title has implied power to sell or mortgage it only for firm purposes.<sup>58</sup>

### SAME—POWER TO PLEDGE OR MORTGAGE FIRM PROPERTY

**96. A partner has implied power to pledge or mortgage the personal property of the firm, either to raise money or to pay the firm debts. But a partner has no power to mortgage the firm realty without special authority.**

The power to give chattel mortgages and pledges is co-extensive with the power to sell firm property, on the one hand, and the power to borrow money, on the other.<sup>59</sup> In the case of an ordinary trading partnership, the authorities are all agreed that a partner has implied power to mortgage any or all of the firm chattels held for the purpose of sale, either to raise money for the firm, or to secure firm debts, even antecedent debts.<sup>60</sup> But a partner has no implied

653, 69 Am. Dec. 375; *Lawrence v. Taylor*, 5 Hill (N. Y.) 107; *Frost v. Wolf*, 77 Tex. 455, 14 S. W. 440, 19 Am. St. Rep. 761.

Although ineffective to pass the title of his copartners, it is held to convey the interest of the partner actually executing it. *Ellott v. Dycke*, 78 Ala. 150; *Goddard v. Renner*, 57 Ind. 532; *Walton v. Tusten*, 49 Miss. 569. See "*Partnership*," *Dec. Dig. (Key No.)* §§ 138, 141; *Cent. Dig.* § 218.

<sup>58</sup> *ROBINSON BANK v. MILLER*, 153 Ill. 244, 38 N. E. 1078, 27 L. R. A. 449, 46 Am. St. Rep. 883, *Gilmore, Cas. Partnership*, 171; *Clark v. Allen*, 34 Iowa, 190; *Chittenden v. German-American Bank*, 27 Minn. 143, 6 N. W. 773; *Tarbell v. West*, 86 N. Y. 287. See, also, *National Union Bank of Maryland v. National Mechanics' Bank*, 80 Md. 371, 30 Atl. 913, 27 L. R. A. 476, 45 Am. St. Rep. 350; *GOLDTHWAITE v. JANNEY*, 102 Ala. 431, 15 South. 560, 23 L. R. A. 161, 48 Am. St. Rep. 56. See "*Partnership*," *Dec. Dig. (Key No.)* §§ 138, 141; *Cent. Dig.* §§ 217-221.

<sup>59</sup> See ante, § 94, p. 288; post, § 99, p. 300.

<sup>60</sup> *Gates v. Bennett*, 33 Ark. 475; *Phillips v. Trowbridge Furniture Company*, 86 Ga. 699, 13 S. E. 19; *Nelson v. Wheelock*, 46 Ill. 25; *McCarthy v. Selsler*, 130 Ind. 63, 29 N. E. 407; *Patch v. Wheatland*, 8 Allen (Mass.) 102; *Richardson v. Lester*, 83 Ill. 55;

power to give security for the debts of others.<sup>61</sup> And a partner has no power to mortgage the firm property for his individual debts.<sup>62</sup> With regard to property not held for the purpose of sale, however, the law seems to put mortgages and pledges upon the same basis as assignments for the benefit of creditors, denying the presumption of the power, except where the other partners have absconded, are absent, or are otherwise incapacitated from assenting or dissenting.<sup>63</sup> The power to pledge is implied from the power to borrow money on the credit of the firm.<sup>64</sup>

*Same—Power to Mortgage Firm Realty*

The general rule seems to be that one partner has no implied authority to mortgage the firm real estate,<sup>65</sup> and, in

*Dickson v. Dryden*, 97 Iowa, 122, 66 N. W. 148; *Beckman v. Noble*, 115 Mich. 523, 73 N. W. 803; *Keck v. Fisher*, 53 Mo. 532; *Galway v. Fullerton*, 17 N. J. Eq. 389; *Horton v. Bloedorn*, 37 Neb. 666, 56 N. W. 321; *Morris v. Hubbard*, 14 S. D. 525, 86 N. W. 25; *West Coast Grocery Company v. Stinson*, 13 Wash. 255, 43 Pac. 35; *Rock v. Collins*, 99 Wis. 630, 75 N. W. 426, 67 Am. St. Rep. 885; *Union Nat. Bank v. Kansas City Bank*, 136 U. S. 223, 10 Sup. Ct. 1013, 34 L. Ed. 341. See "*Partnership*," *Dec. Dig. (Key No.)* § 142; *Cent. Dig.* § 223.

<sup>61</sup> *Bank of Commerce v. Selden*, 3 Minn. 160 (Gil. 99); *Lellman v. Mills*, 15 Wyo. 149, 87 Pac. 985. See "*Partnership*," *Dec. Dig. (Key No.)* § 142; *Cent. Dig.* §§ 222-223.

<sup>62</sup> *Lance v. Butler*, 135 N. C. 419, 47 S. E. 488. See "*Partnership*," *Dec. Dig. (Key No.)* § 142; *Cent. Dig.* §§ 222-223.

<sup>63</sup> See *TAPLEY v. BUTTERFIELD*, 1 Metc. (Mass.) 515, 35 Am. Dec. 375; *Hage v. Campbell*, 78 Wis. 572, 47 N. W. 179, 23 Am. St. Rep. 422; *McCarthy v. Selsler*, 130 Ind. 63, 29 N. E. 407; *Horton v. Bloedorn*, 37 Neb. 666, 56 N. W. 321. See "*Partnership*," *Dec. Dig. (Key No.)* § 142; *Cent. Dig.* §§ 222-223.

<sup>64</sup> *Harris v. Baltimore*, 73 Md. 22, 17 Atl. 1046, 20 Atl. 111, 8 L. R. A. 677, 25 Am. St. Rep. 565; *Hopkins v. Thomas*, 61 Mich. 389, 28 N. W. 147; *Clark v. Rives*, 33 Mo. 579; *Keller v. Smith*, 20 Tex. Civ. App. 314, 49 S. W. 263; *George v. Tate*, 102 U. S. 564, 26 L. Ed. 232; *Marshall v. McClure*, 10 App. Cas. 325. See "*Partnership*," *Dec. Dig. (Key No.)* § 142; *Cent. Dig.* §§ 222-223.

<sup>65</sup> *Greer v. Ferguson*, 56 Ark. 324, 19 S. W. 966; *Cottle v. Harrold*, 72 Ga. 830; *Kahn v. Becnel*, 108 La. 296, 32 South. 444; *Hardin v. Dolge*, 46 App. Div. 416, 61 N. Y. Supp. 753; *McGahan v. Rondout Bank*, 156 U. S. 218, 15 Sup. Ct. 347, 39 L. Ed. 403.

But such a mortgage has been held effective as to the interest of the partner executing it. *Cottle v. Harrold*, 72 Ga. 830; *Baker v.*

the absence of prior express authority or subsequent ratification, an attempt to do so is futile. But the absence of such power is doubtless due here, as in the case of conveyances of real estate already noticed, to the peculiar rule in regard to sealed instruments.<sup>66</sup> In a trading firm, where real estate is held for sale, and where the power exists to borrow money and issue negotiable paper, it would seem that there should be the power to mortgage the firm real estate as security. While such a mortgage might be ineffective, because of the lack of implied authority to execute a sealed instrument, it should be treated as an equitable mortgage,<sup>67</sup> especially in a jurisdiction where the firm realty is regarded as converted into personalty for the payment of firm debts.<sup>68</sup> However, a firm, by permitting the title to firm realty to stand in the name of one partner, clothes him with apparent authority to mortgage it in his own name for firm purposes.<sup>69</sup>

Lee, 49 La. Ann. 874, 21 South. 588; *Weeks v. Mascoma Rake Co.*, 58 N. H. 101; *Watts v. Durscoll*, 82 L. T. Rep. N. S. 255 (affirmed in 1901, 1 Ch. 294). See "*Partnership*," *Dec. Dig. (Key No.)* § 142; *Cent. Dig.* § 222.

<sup>66</sup> It is not always put upon that ground, as appears from the following: "Lands held by partners are considered as lands held by tenants in common; and as one tenant in common cannot pass any estate of his cotenant, and as land cannot pass without deed, it follows that one partner cannot convey away the real estate of the firm, without special authority." Shaw, C. J., in *TAPLEY v. BUTTERFIELD*, 1 Metc. (Mass.) 515, 35 Am. Dec. 375, *Gilmore, Cas. Partnership*, 236, note. See "*Partnership*," *Dec. Dig. (Key No.)* §§ 138, 141, 142; *Cent. Dig.* §§ 217-228.

<sup>67</sup> *Ex parte Broadbent*, 4 Deac. & C. 3; *Lindley, Partnership* (7th Eng. Ed.) 166. See "*Partnership*," *Dec. Dig. (Key No.)* § 142; *Cent. Dig.* § 222.

<sup>68</sup> *Long v. Slade*, 121 Ala. 267, 25 South. 31. It has been held, however, that a mortgage on firm realty cannot be regarded as a mortgage on personalty, merely because realty is sometimes considered personalty in equity. *Miller v. Proctor*, 20 Ohio St. 442. See "*Partnership*," *Dec. Dig. (Key No.)* § 142; *Cent. Dig.* §§ 222-228.

<sup>69</sup> *ROBINSON BANK v. MILLER*, 153 Ill. 244, 38 N. E. 1078, 27 L. R. A. 449, 46 Am. St. Rep. 883, *Gilmore, Cas. Partnership*, 171; *Chittenden v. German-American Bank*, 27 Minn. 143, 6 N. W. 778. See "*Partnership*," *Dec. Dig. (Key No.)* §§ 142, 155; *Cent. Dig.* §§ 222-228, 278, 279.

### SAME—ASSIGNMENT FOR BENEFIT OF CREDITORS

97. A partner has no authority to make an assignment for the benefit of creditors, without the consent of all the partners who are within the jurisdiction and who are accessible.

By the weight of authority, it is not within the scope of authority of one partner to assign all the property of the firm for the benefit of creditors, when the other partners can be consulted; for such an assignment, far from being preservative, like the power to sell all the property of a trading partnership in order to pay debts, is really destructive of the partnership business.<sup>70</sup> If, however, the other partners are permanently beyond the jurisdiction, or for some other reason incapable of giving their assent or dissent to the proposed assignment, a partner has implied power to make it of his own motion.<sup>71</sup> But mere temporary disability, due to illness or absence, will not warrant such an assignment.<sup>72</sup> A managing partner, where the others are absent from the country, or even, as held in one

<sup>70</sup> *Fox v. Curtis*, 176 Pa. 52, 34 Atl. 952; *WELLES v. MARCH*, 30 N. Y. 344; *Brooks v. Sullivan*, 32 Wis. 444; *Crittenden v. Hill*, 61 Minn. 462, 63 N. W. 1030; *Osborne v. Barge* (C. C.) 29 Fed. 725.

Some cases, however, sustain such an assignment on the ground that, if a partner has implied power to sell all the firm assets, he should also have the power to assign them for the benefit of creditors. *Scruggs v. Burruss*, 25 W. Va. 670; *Hennessey v. Western Bank*, 6 Watts & S. (Pa.) 300, 40 Am. Dec. 560. See "*Partnership*," *Dec. Dig. (Key No.)* § 151; *Cent. Dig.* §§ 267-271.

<sup>71</sup> *DECKARD v. CASE*, 5 Watts (Pa.) 23, 30 Am. Dec. 287, *Gilmore, Cas. Partnership*, 233; *Loeb v. Pierpoint*, 58 Iowa, 469, 12 N. W. 544, 43 Am. Rep. 122; *Sullivan v. Smith*, 15 Neb. 476, 19 N. W. 620, 48 Am. Rep. 354; *Rumery v. McCulloch*, 54 Wis. 565, 12 N. W. 65; *Mayer v. Bernstein*, 69 Miss. 17, 12 South. 257; *H. B. CLAF-LIN CO. v. EVANS*, 55 Ohio St. 183, 45 N. E. 3, 60 Am. St. Rep. 686. See "*Partnership*," *Dec. Dig. (Key No.)* § 151; *Cent. Dig.* §§ 267-271.

<sup>72</sup> *Stadelman v. Loehr*, 47 Hun (N. Y.) 327; *Stockham v. Wells*, 25 Wkly. Notes Cas. (Pa.) 84. See "*Partnership*," *Dec. Dig. (Key No.)* § 151; *Cent. Dig.* §§ 267-271.

case, merely nonresident, may make an assignment.<sup>73</sup> So, also, as with other powers not implied, an assignment by one partner will be valid if the other partners have previously consented to it, or subsequently ratify; but a ratification will not affect liens of firm creditors acquired in the interim.<sup>74</sup> Prior authority or subsequent assent may be implied from the circumstances or from the conduct of the parties.<sup>75</sup>

### SAME—POWER TO BUY

**98. A partner has implied power to buy property, within the scope of the firm's business, on the credit of the firm.**

It has long been decided that every member of an ordinary partnership has implied power to purchase on the credit of the firm such goods as are or may be necessary for carrying on its business in the ordinary way.<sup>76</sup> Thus,

<sup>73</sup> *Williams v. Frost*, 27 Minn. 255, 6 N. W. 793; *H. B. CLAFLIN CO. v. EVANS*, 55 Ohio St. 183, 45 N. E. 3, 60 Am. St. Rep. 686. But see *Cox v. Swofford Bros. Dry Goods Co.*, 2 Ind. T. 61, 47 S. W. 303. See, also, *Voshmik v. Urquhart*, 91 Wis. 513, 65 N. W. 60; *Hennessy v. Western Bank*, 6 Watts & S. (Pa.) 300, 40 Am. Dec. 560.

But the mere fact that a partner, as general manager, has authority to carry on the business for the others, does not necessarily prove authority to make an assignment. *Callahan v. Heinz*, 20 Ind. App. 359, 49 N. E. 1073; *Hook v. Stone*, 34 Mo. 329; *Harper v. Goodsell*, L. R. 5 Q. B. 422. See "*Partnership*," *Dec. Dig. (Key No.)* § 151; *Cent. Dig.* §§ 267-271.

<sup>74</sup> *Stein v. La Dow*, 13 Minn. 412 (Gil. 381). But see *Adee v. Cornell*, 93 N. Y. 572. A letter from an absent partner, containing the words, "Take charge of everything in our business; close it up speedily," is sufficient consent to an assignment. *WELLES v. MARCH*, 30 N. Y. 344. See "*Partnership*," *Dec. Dig. (Key No.)* §§ 151, 157; *Cent. Dig.* §§ 267-271, 290.

<sup>75</sup> *SHATTUCK v. CHANDLER*, 40 Kan. 516, 20 Pac. 225, 10 Am. St. Rep. 227, *Gilmore, Cas. Partnership*, 236; *Kirby v. Ingersoll*, 1 Doug. (Mich.) 477; *Lowenstein v. Flauraud*, 11 Hun (N. Y.) 399.

The burden of proving sufficient authority is upon those claiming under the assignment. *Callahan v. Heinz*, 20 Ind. App. 359, 49 N. E. 1073. See "*Partnership*," *Dec. Dig. (Key No.)* §§ 151, 155, 157, 217; *Cent. Dig.* §§ 267-271, 278-291, 419, 420.

<sup>76</sup> *PORTER v. CURRY*, 50 Ill. 319, 99 Am. Dec. 520, *Gilmore, Cas.*

where one of a firm of harness makers bought on the credit of the partnership a number of bits to be made up into bridles, but instead pawned them for his own use, the seller of the bits was allowed to recover their price in an action against both partners. The fact that a partner misappropriates the goods to his own use will not relieve the firm of liability.<sup>77</sup> The firm is liable, although the goods may have been supplied to only one of the partners, and no other person may have been known to the supplier as belonging to the firm.<sup>78</sup> If, however, goods are bought by a partner actually and ostensibly as an individual, he alone is liable to the seller; and a partner acting thus as an individual, and not as an agent, would in such a transaction still be solely liable, even should the firm become benefited by it.<sup>79</sup> Nor is the firm liable for goods ordered by and supplied to one partner which it was his duty to contribute to the joint stock of the firm.<sup>80</sup>

Partnership, 368; *McDonald v. Fairbanks, Morse & Co.*, 161 Ill. 124, 43 N. E. 783; *Braches v. Anderson*, 14 Mo. 441; *Mead v. Shepard*, 54 Barb. (N. Y.) 474; *STECKER v. SMITH*, 46 Mich. 14, 8 N. W. 583, *Gilmore, Cas. Partnership*, 367; *Smith v. Smyth*, 42 Iowa, 493; *LEFFLER v. RICE*, 44 Ind. 103, *Gilmore, Cas. Partnership*, 368. A partner may buy land if necessary for the firm business. *Davis v. Cook*, 14 Nev. 265; but see *Clay v. Carter*, 16 Wkly. Notes Cas. (Pa.) 385; *Judge v. Braswell*, 13 Bush (Ky.) 67, 28 Am. Rep. 185. See "*Partnership*," *Dec. Dig. (Key No.)* § 141; *Cent. Dig.* §§ 214-216.

<sup>77</sup> *BOND v. GIBSON*, 1 Camp. 185, *Gilmore, Cas. Partnership*, 366. See "*Partnership*," *Dec. Dig. (Key No.)* § 141; *Cent. Dig.* §§ 214-216.

<sup>78</sup> *BISEL v. HOBBS*, 6 Blackf. (Ind.) 479, *Gilmore, Cas. Partnership*, 321; *Bracken v. March*, 4 Mo. 74; *Gardiner v. Childs*, 8 Car. & P. 345. Where persons were erecting buildings as partners, and one of them bought brick for use therein, without any express agreement that the purchase was an individual purchase, and the brick was used in the buildings, the firm was liable. *STECKER v. SMITH*, 46 Mich. 14, 8 N. W. 583, *Gilmore, Cas. Partnership*, 367. See "*Partnership*," *Dec. Dig. (Key No.)* § 141; *Cent. Dig.* §§ 214-216.

<sup>79</sup> *EMLY v. LYE*, 15 East, 7; *Heckert v. Fegely*, 6 Watts & S. (Pa.) 139; *Sinkler v. Lambert*, 5 Phila. (Pa.) 36; *HOLMES v. BURTON*, 9 Vt. 252, 81 Am. Dec. 621, *Gilmore, Cas. Partnership*, 312. See "*Partnership*," *Dec. Dig. (Key No.)* § 141; *Cent. Dig.* §§ 214-216.

<sup>80</sup> *BANNISTER v. MILLER*, 54 N. J. Eq. 121, 32 Atl. 1066. See "*Partnership*," *Dec. Dig. (Key No.)* § 141; *Cent. Dig.* §§ 214-216.

This power of one partner to bind the firm by a purchase of goods on its credit is not confined to trading partnerships. It is of no consequence what the partnership business may be, if the goods supplied are necessary for its transaction in the ordinary way. Thus a partner of a firm engaged in the livery business is acting within the scope of the partnership business when he procures horses for the use of the firm.<sup>81</sup> One of a firm of lawyers may buy law books for the firm.<sup>82</sup> So, also, where some printers and publishers agreed to share the profits of a work, and the publishers ordered paper for that particular work, and became bankrupt, the printers were held liable for its price to the stationers who supplied it.<sup>83</sup> A partner binds the firm in purchasing goods, even though his intention is to defraud his fellow partners, so long as the seller is not privy to the fraudulent intention.<sup>84</sup>

### SAME—POWER TO BORROW MONEY

**99.** A member of a trading firm has implied power to borrow money, where necessary for the transaction of the partnership business in the ordinary way. A member of a nontrading partnership has no power to borrow, in the absence of previous express authority or subsequent ratification.

The requirements of commerce render it necessary that the power to borrow money should exist in the members of

<sup>81</sup> *Chapple v. Davis*, 10 Ind. App. 404, 38 N. E. 355. See "Partnership," *Dec. Dig. (Key No.)* § 141; *Cent. Dig.* §§ 214-216.

<sup>82</sup> *Alley v. Bowen-Merrill Co.*, 76 Ark. 4, 88 S. W. 838, 113 Am. St. Rep. 73. See "Partnership," *Dec. Dig. (Key No.)* § 141; *Cent. Dig.* §§ 214-216.

<sup>83</sup> *Gardiner v. Childs*, 8 Car. & P. 345. See "Partnership," *Dec. Dig. (Key No.)* § 141; *Cent. Dig.* §§ 214-216.

<sup>84</sup> *BOND v. GIBSON*, 1 Camp. 185, Gilmore, Cas. Partnership, 366; *Carver v. Dows*, 40 Ill. 874; *Clark v. Johnson*, 90 Pa. 442; *Kenney v. Altwater*, 77 Pa. 84. And see *Johnson v. Barry*, 95 Ill. 483. See "Partnership," *Dec. Dig. (Key No.)* §§ 141, 154; *Cent. Dig.* §§ 214, 276.

a trading partnership.<sup>85</sup> Thus a partner has power to borrow money for his traveling expenses while conducting business for his firm.<sup>86</sup> At the same time the power of borrowing money, like every other implied power of a partner, only exists where it is necessary for the transaction of the partnership business in the ordinary way. Accordingly a partner has no implied authority to borrow where the business is one usually conducted on a cash basis, e. g., mining on the cost-book principle, and third persons, loaning money to one partner, with knowledge of the custom of the firm, do so at their peril.<sup>87</sup> So, also, third persons have no right to assume the existence of the power in a business where borrowing is unusual, as in the case of lawyers or doctors, but must, in order to hold the firm, prove actual authority or ratification.<sup>88</sup> In fact, the power is seldom implied in the case of members of nontrading partnerships.<sup>89</sup>

<sup>85</sup> *Union National Bank of Kansas City, Mo., v. Neill*, 149 Fed. 711, 79 C. C. A. 417, 10 L. R. A. (N. S.) 426; *Smith v. Collins*, 115 Mass. 388; *Pahlman v. Taylor*, 75 Ill. 629; *Blinn v. Evans*, 24 Ill. 317; *Church v. Sparrow*, 5 Wend. (N. Y.) 223; *Sherwood v. Snow*, 46 Iowa, 481, 26 Am. Rep. 155; *National Bank of Commerce v. Meader*, 40 Minn. 325, 41 N. W. 1043; *WINSHIP v. BANK OF UNITED STATES*, 5 Pet. 529, 8 L. Ed. 216, *Gilmore, Cas. Partnership*, 356; *Lemke v. Faustmann*, 124 Ill. App. 624 (1906); *Hatchett & Large v. Sunset Brick & Tile Co. (Tex. Civ. App.)* 99 S. W. 174; *Parker v. Parker (Ky.)* 80 S. W. 209. See "*Partnership*," *Dec. Dig. (Key No.)* § 145; *Cent. Dig.* § 241.

<sup>86</sup> *ROTHWELL v. HUMPHRIES*, 1 Esp. 406, *Gilmore, Cas. Partnership*, 366. See "*Partnership*," *Dec. Dig. (Key No.)* § 145; *Cent. Dig.* § 241.

<sup>87</sup> *Burmester v. Norris*, 6 Exch. 796; *Hawtayne v. Bourne*, 7 Mees. & W. 595; *Ricketts v. Bennett*, 4 C. B. 686. See "*Partnership*," *Dec. Dig. (Key No.)* § 145; *Cent. Dig.* § 241.

<sup>88</sup> *Smith v. Sloan*, 37 Wis. 285, 19 Am. Rep. 757; *Friend v. Dur- yee*, 17 Fla. 111, 35 Am. Rep. 89; *Crosthwait v. Ross*, 1 Humph. (Tenn.) 23, 34 Am. Dec. 613. See "*Partnership*," *Dec. Dig. (Key No.)* §§ 145, 157; *Cent. Dig.* §§ 241, 282.

<sup>89</sup> But see *Hoskinson v. Elliot*, 62 Pa. 393; *LEFFLER v. RICE*, 44 Ind. 103, *Gilmore, Cas. Partnership*, 368. "Partners in other business (than commercial), such as farming, mining, etc., have prima facie no such authority. But this presumption against lack of authority may be rebutted by showing that the organization and particular purposes of the firm are such as to render it in the special instance necessary, or, if not necessary, usual in similar cases."

Nor, even in a trading partnership, does the power to borrow money cover the borrowing of money to increase the capital of the firm, which is the mere aggregate of the contributions of all the partners. The transaction is in effect like borrowing money for the partner's own individual contribution, for which he alone remains bound.<sup>90</sup> Still less will the firm be bound where borrowing is prohibited, and the person advancing the money is aware of the prohibition.<sup>91</sup>

### SAME—POWER TO ISSUE BILLS AND NOTES

100. A member of a trading partnership has implied power to bind the firm on negotiable instruments. A member of a nontrading partnership has *prima facie* no such power.

#### *In Trading Partnerships*

Since a partner in trading partnerships has implied power to borrow money on the credit of the firm, he should

*Deardorf's Adm'r v. Thacher*, 78 Mo. 131, 47 Am. Rep. 95. See "*Partnership*," *Dec. Dig. (Key No.)* § 145; *Cent. Dig.* § 241.

<sup>90</sup> *Fisher v. Taylor*, 2 Hare, 218; *Greenslade v. Dower*, 7 Barn. & C. 635. The power to borrow money so as to bind the firm includes the case of his obtaining money from the firm's bank by an overdraft. *Blackburn Bldg. Soc. v. Cunliffe*, 22 Ch. Div. 61, 9 App. Cas. 857; *Waterlow v. Sharp*, L. R. 8 Eq. 501. But it does not include opening a bank account in his own name. *Alliance Bank v. Kearsley*, L. R. 6 P. C. 433. See "*Partnership*," *Dec. Dig. (Key No.)* § 145; *Cent. Dig.* § 241.

<sup>91</sup> *In re Worcester Corn Exchange Co.*, 3 De Gex, M. & G. 180; *Blackburn Bldg. Soc. v. Cunliffe*, 22 Ch. Div. 61. When money is borrowed by a partner as an individual, the fact that it is applied for the benefit of the firm will not make the firm liable. *Gibbs v. Bates*, 43 N. Y. 192; *National Bank of Salem v. Thomas*, 47 N. Y. 15; *Green v. Tanner*, 8 Metc. (Mass.) 411; *McLinden v. Wentworth*, 51 Wis. 170, 8 N. W. 118. When money is borrowed for the firm, and the partner borrowing it uses it for private purposes, the firm is nevertheless liable. *Stark v. Corey*, 45 Ill. 431; *Real Estate Inv. Co. v. Smith*, 162 Pa. 441, 29 Atl. 855; *Freeman v. Carpenter*, 17 Wis. 126; *Warren v. French*, 6 Allen (Mass.) 317; *Hayward v. French*, 12 Gray (Mass.) 453; *Kleinhaus v. Generous*, 25 Ohio St. 687. See "*Partnership*," *Dec. Dig. (Key No.)* § 145; *Cent. Dig.* § 241.

also have the power to bind the firm by giving evidence of that indebtedness in any of the usual forms of commercial paper. Accordingly third persons are justified in presuming, as a matter of law, that all commercial paper, executed by one of the members of a trading partnership, which bears the signature of the firm, whether as maker, indorser, or acceptor, is issued within the scope of the partnership powers, and for partnership purposes.<sup>92</sup> Although the partnership agreement may expressly forbid any partner from signing the firm name to negotiable paper, such restriction is not binding upon third parties, who without notice become holders of firm paper actually given by a partner for partnership purposes.<sup>93</sup> Even if one partner gives a note or bill in payment of a firm debt, in ignorance that his co-partner has already done so, and both notes or bills come into the hands of bona fide holders without notice of the mistake, the firm is liable on both.<sup>94</sup>

<sup>92</sup> *WINSHIP v. BANK OF UNITED STATES*, 5 Pet. 520, 8 L. Ed. 216, Gilmore, Cas. Partnership, 356; *Silverman v. Chase*, 90 Ill. 37; *PINKNEY v. HALL*, 1 Salk. 126, Gilmore, Cas. Partnership, 371; *Fuller v. Percival*, 126 Mass. 381; *First Nat. Bank of Negau-nee v. Freeman*, 47 Mich. 408, 11 N. W. 219; *Ketcham Nat. Bank v. Hagen*, 164 N. Y. 446, 58 N. E. 523; *Pettyjohn v. Nat. Exchange Bank*, 101 Va. 111, 43 S. E. 203. That a partner cannot bind the firm by a guaranty for the payment of a bill of exchange, see *DUNCAN v. LOWNDES*, 3 Camp. 478, Gilmore, Cas. Partnership, 369; *Lemke v. Faustmann* (1906) 124 Ill. App. 624. As a joint maker of a note is not, as against the holder, a surety for the comaker to the extent of the latter's portion of the note, in case the joint maker is a partnership, the holder will be chargeable with notice of the suretyship, and therefore of the lack of authority to sign the note. *Union Nat. Bank of Kansas City, Mo., v. Neill* (1900) 149 Fed. 711, 79 C. C. A. 417, 10 L. R. A. (N. S.) 426. See "*Partnership*," Dec. Dig. (Key No.) § 146; Cent. Dig. §§ 242-255.

<sup>93</sup> *Bloom v. Helm*, 53 Miss. 21; *Benninger v. Hess*, 41 Ohio St. 64. See "*Partnership*," Dec. Dig. (Key No.) § 146; Cent. Dig. §§ 242-255.

<sup>94</sup> *Davison v. Robertson*, 3 Dow. 218. A joint and several promissory note, signed by one partner for himself and copartners, does not bind them severally. *Sherman v. Christy*, 17 Iowa, 322; *Perring v. Hone*, 2 Car. & P. 401. But it does bind all the partners jointly, and the maker separately. *Doty v. Bates*, 11 Johns. (N. Y.) 544; *LORD GALWAY v. MATTHEW*, 1 Camp. 403; *MacLae v. Sutherland*, 3 El. & Bl. 1; *Snow v. Howard*, 35 Barb. (N. Y.) 55;

### *Nontrading Partnerships*

With respect to nontrading partnerships, however, the great weight of authority denies the implied power of a partner to bind the firm by the issuance of commercial paper.<sup>95</sup> Thus the execution of a note for the purchase price of a team of horses is not within the implied powers of either partner of a firm engaged in the dairy business.<sup>96</sup>

While a nontrading firm cannot usually be held on negotiable paper given by one partner, the plaintiff may show that the usage of the firm or the consent of the other partners justified its issue.<sup>97</sup> Thus, if a member of a nontrad-

Fulton v. Williams, 11 Cush. (Mass.) 108; Gillow v. Lillie, 1 Bing. N. C. 695. See "Partnership," Dec. Dig. (Key No.) § 146; Cent. Dig. §§ 242-255.

<sup>95</sup> PEASE v. COLE, 53 Conn. 53, 22 Atl. 681, 55 Am. Rep. 53, Gilmore, Cas. Partnership, 372; Alley v. Bowen-Merrill Co., 76 Ark. 4, 88 S. W. 838, 113 Am. St. Rep. 73; Teed v. Parsons, 202 Ill. 455, 66 N. E. 1044; Powell Hardware Co. v. Mayer, 110 Mo. App. 14, 88 S. W. 1008. See "Partnership," Dec. Dig. (Key No.) § 146; Cent. Dig. §§ 242-255.

<sup>96</sup> Schellenbeck v. Studebaker, 13 Ind. App. 437, 41 N. E. 845, 55 Am. St. Rep. 240. The power is also denied to one of several mining adventurers. Brown v. Byers, 16 Mees. & W. 252; Dickinson v. Valpy, 10 Barn. & C. 128. There is no custom or usage that attorneys should be parties to negotiable instruments, nor is it necessary for the purposes of their business. HEDLEY v. BAINBRIDGE et al., 3 Adol. & E. 316, Gilmore, Cas. Partnership, 371; Smith v. Sloan, 37 Wis. 235, 19 Am. Rep. 757; Alley v. Bowen-Merrill Co., 76 Ark. 4, 88 S. W. 838, 113 Am. St. Rep. 73. But see Miller v. Hines, 15 Ga. 197; Kimbro v. Bullitt, 22 How. 256, 16 L. Ed. 313; Ulery v. Ginrich, 57 Ill. 531; Hunt v. Chapin, 6 Lans. (N. Y.) 139; Garland v. Kacomb, L. R. 8 Exch. 216; Levy v. Pyne, Car. & M. 453; HARMAN v. JOHNSON, 2 El. & Bl. 61, Gilmore, Cas. Partnership, 399; Crosthwait v. Ross, 1 Humph. (Tenn.) 23, 34 Am. Dec. 613; POOLEY v. WHITMORE, 10 Helsk. (Tenn.) 629, 637, 27 Am. Rep. 733, Gilmore, Cas. Partnership, 360. See "Partnership," Dec. Dig. (Key No.) § 146; Cent. Dig. §§ 242-255.

<sup>97</sup> KIRK v. BLURTON, 9 Mees. & W. 284, Gilmore, Cas. Partnership, 381; PEASE v. COLE, 53 Conn. 53, 22 Atl. 681, 55 Am. Rep. 53, Gilmore, Cas. Partnership, 372; Harris v. Baltimore, 73 Md. 22, 17 Atl. 1046, 20 Atl. 111, 985, 8 L. R. A. 677, 25 Am. St. Rep. 565. One authority broadly lays down the rule, without distinction between trading and nontrading partnerships, that the firm is liable as against bona fide holders on firm paper issued by one partner for his individual use. New York Firemen's Ins. Co. v. Bennett, 5

ing firm concurs in drawing, or authorizes his partner to draw, a bill in the name of the firm, he impliedly authorizes its indorsement in the same name for the purpose for which it was drawn.<sup>98</sup> While the presumption is that in the case of nontrading firms no implied power in a partner exists to bind his copartner on negotiable paper, still it is quite possible to establish a situation where a presumption of such power would arise. "And, of course, the fact that the firm derives the benefit of the act may be taken into consideration when applying this test."<sup>99</sup> In a nontrading firm the question whether each partner has or has not the power to bind the firm by the issuance of negotiable paper would

Conn. 574, 13 Am. Dec. 109. But this was clearly a commercial partnership.

In the following cases notes executed without express authority were held binding on the firm: *Voorhees v. Jones*, 29 N. J. Law, 270 (railroad contractors); *Van Brunt v. Mather*, 48 Iowa, 503 (a storage and forwarding firm); *Miller v. Hines*, 15 Ga. 197 (a law firm). See "*Partnership*," *Dec. Dig. (Key No.)* § 146; *Cent. Dig.* §§ 242-255.

<sup>98</sup> *Horn v. Newton City Bank*, 82 Kan. 518, 4 Pac. 1022. A partner has no authority to sign a bank check postdated, even where he has express authority to issue checks for the firm. *Forster v. Mackreth*, L. R. 2 Exch. 163. A bill drawn and accepted by one partner after the dissolution of the firm, although dated before, does not bind the firm. *WRIGHT v. PULHAM*, 2 Chit. 121; *MARLETT v. JACKMAN*, 3 Allen (Mass.) 287. One partner, after the dissolution of the partnership, cannot indorse notes or bills given before to the firm, so as to bind his copartner, though he is authorized to settle up the firm business. *SANFORD v. MICKLES*, 4 Johns. (N. Y.) 224. But, when one of two partners in trade had, after an act of bankruptcy, accepted a bill of exchange in the name of the firm, without the privity of his copartner, it was held to be an available security in the hands of an innocent indorsee. *LACY v. WOOLCOTT*, 2 Dowl. & R. 458. See "*Partnership*," *Dec. Dig. (Key No.)* § 146; *Cent. Dig.* §§ 242-255.

<sup>99</sup> *VETSCH v. NEISS*, 66 Minn. 459, 69 N. W. 315, *Gilmore, Cas. Partnership*, 379. But see dictum in *New York Firemen's Ins. Co. v. Bennett*, 5 Conn. 574, 13 Am. Dec. 109, that any partnership is bound as against a bona fide purchaser, though the paper was in fact issued for the individual use of the acting partner. "If bills are necessary, then they have a power to accept bills, and so to bind each other." *KIRK v. BLURTON*, 9 Mees. & W. 284, *Gilmore, Cas. Partnership*, 381. See "*Partnership*," *Dec. Dig. (Key No.)* § 146; *Cent. Dig.* §§ 242-255.

properly seem to depend upon whether the issuing of such paper is essential to carry into effect the ordinary purpose for which the partnership was formed.

As the presumption of the existence or nonexistence of the power to sign negotiable paper depends upon whether the firm is trading or nontrading, it becomes important to distinguish between these two kinds of partnerships. This subject is discussed in a previous chapter, which should be read in connection herewith.<sup>1</sup>

#### *Bona Fide Holder*

Like all other makers of commercial paper, a trading partnership is bound to third persons who purchase its paper for value without notice of the lack or abuse of authority on the part of the partner issuing it.<sup>2</sup> If, however, one taking firm paper knows that the partner issuing it had no authority to issue it, or issued it in fraud of the other partners, the firm is not bound to pay the obligation.<sup>3</sup> Thus, where paper in the firm name is given to satisfy a separate debt of the partner executing it, the firm is not bound.<sup>4</sup>

<sup>1</sup> See ante, chapter II, §§ 37, 38, pp. 107-110; chapter V, § 93, p. 286.

<sup>2</sup> *Fuller v. Percival*, 128 Mass. 381; *Atlas Nat. Bank v. Savery*, 127 Mass. 75; *Munroe v. Cooper*, 5 Pick. (Mass.) 412; *Atlantic State Bank of City of Brooklyn v. Savery*, 82 N. Y. 291; *Moorehead v. Gilmore*, 77 Pa. 118, 18 Am. Rep. 435. One who loans money to a member of a mercantile firm, and receives from him a note executed in the name of the firm, has a right to presume that the note is made in the course of the partnership business. *Sherwood v. Snow*, 46 Iowa, 481, 26 Am. Rep. 155; *Platt v. Koehler*, 91 Iowa, 592, 60 N. W. 178. See "*Partnership*," *Dec. Dig. (Key No.)* § 146; *Cent. Dig.* § 252; "*Bills and Notes*," *Dec. Dig. (Key No.)* §§ 327-384; *Cent. Dig.* §§ 788-995.

<sup>3</sup> *New York Firemen's Ins. Co. v. Bennett*, 5 Conn. 574, 13 Am. Dec. 109; *Cotton v. Evans*, 21 N. C. 284; *Smyth v. Strader*, 4 How. 404, 11 L. Ed. 1031; *Moynahan v. Hanaford*, 42 Mich. 329, 3 N. W. 944; *Powell v. Waters*, 8 Cow. (N. Y.) 688; *Boyd v. Plumb*, 7 Wend. (N. Y.) 309. But see, for facts held not to show knowledge of lack of authority, *WAIT v. THAYER*, 118 Mass. 473; *Atlas Nat. Bank v. Savery*, 127 Mass. 75. See "*Partnership*," *Dec. Dig. (Key No.)* § 146; *Cent. Dig.* §§ 242-255.

<sup>4</sup> *Funk v. Babbitt*, 55 Ill. App. 124. A partner cannot issue firm paper for his own accommodation. *National Surety Bank v. McDonald*, 127 Mass. 82; *Wilson v. Williams*, 14 Wend. (N. Y.) 146, 28

But in the case of a trading partnership the fact that the paper was issued for the individual benefit of a partner must have been clearly brought home to the holder, if the firm is to escape liability.<sup>5</sup> In fact, it may be said generally that whether a trading firm is to escape from liability depends upon the notice the holder has. Thus notes made by a member of two firms in the name of one of them, in favor of his copartner in the other firm, for an individual debt, would bind only the individual; for the payee had knowledge of the transaction.<sup>6</sup>

Am. Dec. 518; *Heffron v. Hanaford*, 40 Mich. 305. See "*Partnership*," *Dec. Dig. (Key No.)* §§ 146, 147; *Cent. Dig.* §§ 249, 256, 257.

<sup>5</sup> *Richardson v. Erckens*, 53 App. Div. 127, 65 N. Y. Supp. 872, affirmed 169 N. Y. 588, 62 N. E. 1100. See, also, *King v. Mecklenburg*, 17 Colo. App. 312, 68 Pac. 984. Where notice is clearly proved, the firm is not liable. *First Nat. Bank v. State Nat. Bank*, 131 Fed. 422, 65 C. C. A. 406; *Adams v. Long*, 114 Ill. App. 277; *Kahn v. Overstolz*, 82 Mo. App. 235. "In commercial partnerships a note executed by one member in the firm name is prima facie the obligation of the firm; and, if one of the parties seeks to avoid its payment, the burden of proof lies upon him to show that the note was given in a matter not relating to the partnership business, and that, also, with the knowledge of the holder of the note." *Lee v. First Nat. Bank of Ft. Scott*, 45 Kan. 9, 25 Pac. 196, 11 L. R. A. 238; *Third Nat. Bank v. Snyder*, 10 Mo. App. 218; *Stevens v. McLachlan*, 120 Mich. 285, 79 N. W. 627. See "*Partnership*," *Dec. Dig. (Key No.)* § 142; *Cent. Dig.* §§ 242-255.

<sup>6</sup> *McConnell v. Wilkins*, 13 Ont. App. (Can.) 438. Where the firm name is that of an individual, and the latter executes and delivers a note, so that it does not appear as a certainty whether it is a firm or private obligation, the burden of proof is on the holder to show that the note was given on the partnership account; the presumption being, where he is engaged in no separate business, that the maker intended to bind the firm. *YORKSHIRE BANKING CO. v. BEATSON*, 5 C. P. Div. 109, *Gillmore, Cas. Partnership*, 157; *United States Bank v. Binney*, 5 Mason, 176, *Fed. Cas. No.* 10,791; *Funk v. Babbitt*, 55 Ill. App. 124. Contra, that the burden of proof is on the firm to show that it was not the obligor, *Miffin v. Smith*, 17 Serg. & R. (Pa.) 165. But see *Burroughs' Appeal*, 26 Pa. 264. Where the firm name imports a partnership, see *Carrier v. Cameron*, 31 Mich. 373, 18 Am. Rep. 192; *Vallett v. Parker*, 6 Wend. (N. Y.) 615; *Whitaker v. Brown*, 16 Wend. (N. Y.) 505; *Hogg v. Orgill*, 34 Pa. 344. As to the liability of dormant partners, see *Bank of Alexandria v. Mandeville*, 1 Cranch, C. C. 575, *Fed. Cas. No.* 851;

In case of a nontrading partnership the innocent purchaser for value will seldom be protected, for the issuing of the paper will usually be beyond the power of the partner.<sup>7</sup> Moreover, the very nature of the business and of the particular transaction is sometimes sufficient to prevent the holder from being considered an innocent purchaser for value. Thus, where one member of a shipping firm signed the partnership name as surety for another's individual obligation, it was held that the nature of the transaction precluded the innocence of the holder.<sup>8</sup>

### SAME—POWER TO EXECUTE SEALED INSTRUMENTS

101. A partner has no implied power to bind his copartner by the execution of sealed instruments.

#### EXCEPTIONS AND QUALIFICATIONS:

- (a) One partner may execute a sealed release of a firm debt.
- (b) When the seal is unnecessary to the validity of the instrument, it will be treated as surplusage, and the document will be regarded as unsealed.
- (c) When the instrument is executed in the personal presence of all the partners and with their

*Ontario Bank v. Hennessey*, 48 N. Y. 545. Where a note is given partly for a private debt and partly for a firm debt, the cases are not agreed as to the effect. *King v. Faber*, 22 Pa. 21; *Rice v. Doane*, 164 Mass. 136, 41 N. E. 126; *Guild v. Belcher*, 119 Mass. 257; *Wilson v. Forder*, 20 Ohio St. 89, 5 Am. Rep. 927. See "*Partnership*," *Dec. Dig. (Key No.)* §§ 134, 146; *Cent. Dig.* §§ 200, 242-255.

<sup>7</sup> *PEASE v. COLE*, 53 Conn. 53, 22 Atl. 681, 55 Am. Rep. 53, *Gilmore, Cas. Partnership*, 372. *Dickinson v. Vaply*, 10 B. & C. 128; *Cocke v. Branch Bank at Mobile*, 3 Ala. 175; *Deardorf's Adm'r v. Thacher*, 78 Mo. 123, 135, 47 Am. Rep. 95. See "*Partnership*," *Dec. Dig. (Key No.)* § 146; *Cent. Dig.* §§ 242-255.

<sup>8</sup> *ROLLINS v. STEVENS*, 31 Me. 454, *Gilmore, Cas. Partnership*, 370; *DUNCAN v. LOWNDES*, 3 Camp. 478, *Gilmore, Cas. Partnership*, 369. A firm can be held upon paper signed in blank in its name by a partner. *Chemung Canal Bank v. Bradner*, 44 N. Y. 680. *Contra: Hogarth v. Lathan*, 3 Q. B. Div. 643. See "*Partnership*," *Dec. Dig. (Key No.)* § 146; *Cent. Dig.* § 252.

knowledge, it will be regarded as the instrument of all.

- (d) When there is previous authority or subsequent ratification, which may be shown by parol, or may be implied from the declarations or acts of the parties, or from the circumstances, the instrument will be binding.

At common law one partner could not bind the firm by deed, bond, mortgage, or other instrument under seal, unless he had express authority to do so under the seals of the other partners.<sup>9</sup> The reason usually given for this rule is that to recognize such a power would enable one partner to give a favorite creditor a lien on the real estate of the partners, and, consequently, a preference over the simple contract creditors of the firm.<sup>10</sup> The correct reason, however, is to be found in the fact that a deed of real estate, the kind of instrument under seal with which this rule originated, is not ordinarily a commercial document. As already pointed out,<sup>11</sup> real estate was not usually the subject-matter of a partnership, and its conveyance, not pertaining to the customary activities of mercantile firms, was naturally not regarded as within the implied powers of partners. The rule being established, however, with respect to deeds, was extended to all sealed instruments, and the statement became common that contracts under seal were not ordinary mercantile documents and were subject to rules of law independent of trade and commerce.<sup>12</sup> While deeds

<sup>9</sup> "A general partnership agreement, though under seal, does not authorize the partners to give deeds for each other, unless a particular power be given for that purpose." Per Kenyon, C. J., in *HARRISON v. JACKSON et al.*, 7 Term R. 207, Gilmore, Cas. Partnership, 382. See "*Partnership*," *Dec. Dig. (Key No.)* § 137; *Cent. Dig.* § 205.

<sup>10</sup> *HARRISON v. JACKSON et al.*, *supra*. See "*Partnership*," *Dec. Dig. (Key No.)* § 137; *Cent. Dig.* § 205.

<sup>11</sup> See ante, p. 292.

<sup>12</sup> *Gerard v. Basse*, 1 Dall. 119, 1 L. Ed. 63; *Macleod's Theory and Practice of Banking* (4th Ed.) pp. 236-244; *STRAFFIN'S ADM'R v. NEWELL*, T. U. P. Charit. (Ga.) 163, 4 Am. Dec. 705.

of real estate were not usual mercantile documents, there were, however, other documents under seal which did pertain to trade and commerce, and which might properly be held to be within the implied power of a partner to execute. Thus, in *Straffin's Adm'r v. Newell*,<sup>13</sup> which involved the binding effect upon the firm of a sealed charter party executed by one partner, the court, in upholding the instrument, said: "I bottom my decision upon the broad ground that a charter party is exclusively a mercantile transaction, and always in the course of trade."<sup>14</sup> It should be noticed that the inability of a partner to bind his copartner by a sealed instrument was due to the entire absence of power, and not merely to the lack of power evidenced in the proper manner, viz., under seal.

#### *Exceptions and Qualifications*

While the rule is nominally adhered to, the inconvenience of it has been avoided by the courts in various ways. It was very early held that one partner could execute under seal a release of a firm debt. This was an incident to the implied power of each partner to collect debts.<sup>15</sup> But a

See "*Partnership*," *Dec. Dig. (Key No.)* §§ 137, 141; *Cent. Dig.* §§ 205, 218.

<sup>13</sup> *STRAFFIN'S ADM'R v. NEWELL*, T. U. P. Charlt. (Ga.) 163, 4 Am. Dec. 705. See "*Partnership*," *Cent. Dig.* §§ 206.

<sup>14</sup> If all forms of sealed instruments are foreign to ordinary commercial transactions, and hence beyond the scope of a partner's implied power, it would seem that the statutory changes abolishing the distinction between sealed and unsealed instruments has considerably enlarged the implied powers of a partner. 1 Bates, *Partnership*, § 413, note.

It has been held that, where a statute gives to notes the status of sealed instruments, a partner may nevertheless have implied power to execute such notes. *Southard v. Steele*, 3 T. B. Mon. (Ky.) 438; *Montgomery v. Boone*, 2 B. Mon. (Ky.) 244. See "*Partnership*," *Dec. Dig. (Key No.)* § 139; *Cent. Dig.* § 206.

<sup>15</sup> "It is a general principle of law that, where two have a joint personal interest, the release of one bars the other; and I cannot perceive that the case of copartners in trade proves an exception to the general rule. Each partner is competent to sell the effects, or to compound or discharge the partnership demands. He is to be considered as an authorized agent of the firm for all such purposes. Each has an entire control over the personal estate. So, in like manner, one coexecutor or administrator cannot bind his com-

mere covenant by one partner not to sue for a partnership debt does not amount to a release of that debt by the firm.<sup>16</sup> An actual release, moreover, must be bona fide made; if it can be shown that one partner has executed it in collusion with the defendant, with the fraudulent intention of preventing his copartners from enforcing a just demand, the defendant will not be allowed to plead this release as a defense to an action against him.<sup>17</sup>

*Same—Seal Treated as Surplusage*

A further exception is recognized in cases where the seal which the partner affixes is unnecessary to the validity of the transaction in question. If one partner puts a seal on a firm note, the seal may be disregarded, and all the partners held to their ordinary liability.<sup>18</sup> A seal unnecessarily affixed to a firm obligation will be treated as mere surplusage, and the partners held as on a note, bill, or simple contract, as the case may be.<sup>19</sup>

panion to an obligation, but he may commit a separate devastavit and release of a debt." Per Kent, C. J., in *Pierson v. Hooker*, 3 Johns. (N. Y.) 68, 8 Am. Dec. 467. See, also, *Dyer v. Sutherland*, 75 Ill. 583; *Gillilan v. Sun Mut. Ins. Co.*, 41 N. Y. 376; *Noonan v. Orton*, 31 Wis. 285; *McDONALD v. EGGLESTON*, 26 Vt. 154, 60 Am. Dec. 303, *Gilmore, Cas. Partnership*, 383. But see *Brayley v. Goff*, 40 Iowa, 76; *Gram v. Cadwell*, 5 Cow. (N. Y.) 489. See "*Partnership*," *Dec. Dig. (Key No.) § 148; Cent. Dig. § 233*.

<sup>16</sup> *Emerson v. Baylies*, 19 Pick. (Mass.) 56; *Walnesley v. Cooper*, 11 Adol. & E. 216. Cf. *Richards v. Fisher*, 2 Allen (Mass.) 527. See "*Partnership*," *Dec. Dig. (Key No.) § 148; Cent. Dig. § 233*.

<sup>17</sup> *Gram v. Cadwell*, 5 Cow. (N. Y.) 489; *Huntington v. Potter*, 32 Barb. (N. Y.) 300; *Brayley v. Goff*, 40 Iowa, 76; *Beatson v. Harris*, 60 N. H. 83. See "*Partnership*," *Dec. Dig. (Key No.) § 148; Cent. Dig. § 233*.

<sup>18</sup> *Purviance v. Sutherland*, 2 Ohio St. 478; *semble*, chattel mortgage, *TAPLEY v. BUTTERFIELD*, 1 Metc. (Mass.) 515, 35 Am. Dec. 374. See "*Partnership*," *Dec. Dig. (Key No.) §§ 137, 146; Cent. Dig. §§ 205, 247*.

<sup>19</sup> *EDWARDS v. DILLON*, 147 Ill. 14, 35 N. E. 135, 37 Am. St. Rep. 199, *Gilmore, Cas. Partnership*, 387; *Sweetzer v. Mead*, 5 Mich. 107; *Price v. Alexander*, 2 G. Greene (Iowa) 427, 52 Am. Dec. 526; *Gibson v. Warden*, 14 Wall. 247, 20 L. Ed. 797. Cf. *Purviance v. Sutherland*, 2 Ohio St. 478. For certain further exceptions to the general rule as to sealed instruments, permitted in bankruptcy proceedings, see *Halsey v. Fairbanks*, 4 Mason, 206, Fed. Cas. No. 5-

*Same—Instruments Executed in Presence of Partners*

Where one partner executes an instrument under seal in the presence of his copartners, they being cognizant of the transaction and offering no objection, the instrument is regarded as the deed of all.<sup>20</sup>

*Same—Parol Authority or Assent*

Although by the law governing sealed instruments the agent executing them was required to have sealed authority, still in partnership transactions this requirement was relaxed, and a previous oral authority or a subsequent oral ratification is sufficient to supply the want of express authorization. Such previous authority or subsequent ratification may be implied from the declarations or acts of the partners, or from the circumstances.<sup>21</sup>

964; *Dudgeon v. O'Connell*, 12 Ir. Eq. 566; *In re Sauls* (D. C.) 5 Fed. 715; *Ex parte Hodgkinson*, 19 Ves. 291. The authority of one member of a partnership to execute a sealed lease in the name of the firm will be presumed, where his partner was instrumental in procuring the lease. *Bodey v. Cooper*, 82 Md. 625, 34 Atl. 362. See, also, *STRAFFIN'S ADM'R v. NEWELL*, T. U. P. Charlt. (Ga.) 163, 4 Am. Dec. 705. *In re Barrett*, 2 Hughes, 444, Fed. Cas. No. 1,043, holding that a partner may execute a power of attorney under seal in the firm name for the purpose of collecting the firm debts, because of "the necessity of the case." See "*Partnership*," *Dec. Dig. (Key No.)* § 137; *Cent. Dig.* § 205.

<sup>20</sup> *Flichthorn v. Boyer*, 5 Watts (Pa.) 159, 80 Am. Dec. 300; *Ball v. Dunsterville*, 4 Term R. 313; *Burn v. Burn*, 3 Ves. 573. Formerly the court held that, if any one of the partners was not so present and thus assenting, it would require a formal instrument under his hand and seal to clothe the partner officiating in the transaction with the requisite authority to bind such absentee, but the courts are now far less strict. *Bentzen v. Zierlein*, 4 Mo. 417; *Cummins v. Cassily*, 5 B. Mon. (Ky.) 74; *HARRISON v. JACKSON*, 7 Term R. 207, *Gilmore, Cas. Partnership*, 382; *SMITH v. KERR*, 3 N. Y. 144; *Schmertz v. Shreeve*, 62 Pa. 457, 1 Am. Rep. 439; *Wilcox v. Dodge*, 12 Ill. App. 517; *Russell v. Annable*, 109 Mass. 72, 12 Am. Rep. 665. See "*Partnership*," *Dec. Dig. (Key No.)* § 137; *Cent. Dig.* § 205.

<sup>21</sup> *EDWARDS v. DILLON*, 147 Ill. 14, 35 N. E. 135, 37 Am. St. Rep. 199, *Gilmore, Cas. Partnership*, 387; *McDONALD v. EGGLESTON*, 28 Vt. 154, 60 Am. Dec. 303, *Gilmore, Cas. Partnership*, 383; *Swan v. Stedman*, 4 Metc. (Mass.) 548; 1 Am. Lead. Cas. 446; *SMITH v. KERR*, 3 N. Y. 144; *Wilcox v. Dodge*, 12 Ill. App. 517; *Pike v. Bacon*, 21 Me. 230, 33 Am. Dec. 259; *Pollock v. Jones*, 124

*Partner Bound Although Firm is Not Bound*

Although the partner, executing a sealed instrument in the name of the firm without actual authority, may not succeed in binding his copartners, he may nevertheless bind himself, either upon the instrument itself, or upon an implied warranty of authority.<sup>21</sup>

**SAME—POWER TO PAY AND COLLECT DEBTS**

**102.** A partner has implied power to collect debts owed to the firm, and to pay those which it owes.

Each member of a partnership, in consequence of his agency, has implied power to accept payment of firm debts, and to give receipts and releases therefor.<sup>22</sup> The power exists, although the firm has been dissolved, and some third

Fed. 163, 61 C. C. A. 555; *MILLER v. ROYAL FLINT GLASS WORKS*, 172 Pa. 70, 33 Atl. 350.

In a few jurisdictions it is held that there must be previous sealed authority or subsequent sealed ratification. *Cummins v. Cassily*, 5 B. Mon. (Ky.) 74; *Gordon v. Funkhouser*, 100 Va. 675, 42 S. E. 677. See "*Partnership*," *Dec. Dig. (Key No.)* §§ 137, 157; *Cent. Dig.* §§ 205, 236.

<sup>21</sup> *United States v. Astley*, 8 Wash. C. C. 508, Fed. Cas. No. 14,472; *Hoskinson v. Elliot*, 62 Pa. 393; *Van Deusen v. Blum*, 18 Pick. (Mass.) 229, 29 Am. Dec. 532; *Skinner v. Dayton*, 19 Johns. (N. Y.) 513, 10 Am. Dec. 236; *Settle v. Davidson*, 7 Mo. 604; *Bowker v. Burdekin*, 12 L. J. Exch. 329. But see *Hart v. Withers*, 1 Pen. & W. (Pa.) 235, 21 Am. Dec. 382; *Brown v. Bostian*, 51 N. C. 1; *Fisher v. Pender*, 52 N. C. 483.

See, also, chapter III, § 63, p. 196. See "*Partnership*," *Dec. Dig. (Key No.)* §§ 137, 161; *Cent. Dig.* §§ 205, 295½.

<sup>22</sup> *Collins v. Collins* (Ky.) 83 S. W. 99; *People v. Devlin*, 63 Misc. Rep. 363, 118 N. Y. Supp. 478; *Progressive Lumber Co. v. Rogers* (Tex. Civ. App.) 120 S. W. 260; *Salmon v. Davis*, 4 Bin. (Pa.) 375, 5 Am. Dec. 410; *Vanderburgh v. Bassett*, 4 Minn. 242 (Gil. 171). He has the power to receive tenders of payment. *Wyckoff v. Anthony*, 9 Daly (N. Y.) 417; *Douglas v. Patrick*, 3 Term R. 683. And to give receipts and releases. *Gordon v. Freeman*, 11 Ill. 14; *Steele v. First Nat. Bank of Joliet*, 60 Ill. 23; *Henderson v. Wild*, 2 Camp. 561; *Dyer v. Sutherland*, 75 Ill. 583. Such receipts and releases may be impeached by the firm for fraud. *Gordon v. Albert*, 168 Mass. 150, 46 N. E. 423. For the effect of a fraudulent release on the pow-

person has been appointed for the purpose of collecting the outstanding assets.<sup>24</sup> Nor is the power limited to the receipt of cash. The partner may receive negotiable paper in payment, and even goods, if the nature of the firm's business and its usage will justify.<sup>25</sup> But a bill or note made in the partner's own name will not affect the firm's right of action against the debtor, unless the partner had actual authority from the firm to accept a bill so made, or unless the bill is actually paid;<sup>26</sup> and, similarly, goods which are accepted in payment must be for the use of the firm, not for the individual use of the partner.<sup>27</sup>

On the same general principles, a partner has implied power to compromise firm debts, where he acts in good faith, without fraud or collusion, and with reasonable care.<sup>28</sup>

Since a partner has implied power to accept payment of obligations due the firm, the converse power to pay the firm debts may also be implied.<sup>29</sup> Another phase of this

er to sue at law on the released claim, see chapter IX, § 194, pp. 560-565. See "*Partnership*," *Dec. Dig. (Key No.)* §§ 143, 148; *Cent. Dig.* §§ 229-233½.

<sup>24</sup> *MAJOR v. HAWKES*, 12 Ill. 298, Gilmore, Cas. Partnership, 403; *Tyng v. Thayer*, 8 Allen (Mass.) 391; *Robbins v. Fuller*, 24 N. Y. 570; *Gillilan v. Sun Mut. Ins. Co.*, 41 N. Y. 376. Not so, however, if the debt had, to the knowledge of the debtor, been previously assigned to an individual partner. *Hilton v. Vanderbilt*, 82 N. Y. 591; *Bank of Montreal v. Page*, 98 Ill. 109. See "*Partnership*," *Dec. Dig. (Key No.)* §§ 143, 148, 283; *Cent. Dig.* §§ 229-233½, 642-644.

<sup>25</sup> *Heartt v. Walsh*, 75 Ill. 200; *Tomlins v. Lawrence*, 8 Moore & P. 555; *Lee v. Hamilton*, 12 Tex. 413, 418. See "*Partnership*," *Dec. Dig. (Key No.)* § 143; *Cent. Dig.* § 230.

<sup>26</sup> *Hogarth v. Wherley*, L. R. 10 C. P. 630. See "*Partnership*," *Dec. Dig. (Key No.)* § 143; *Cent. Dig.* §§ 229-233½.

<sup>27</sup> *Farwell v. St. Paul Trust Co.*, 45 Minn. 495, 48 N. W. 326, 22 Am. St. Rep. 742; *Gregg v. James, Breese* (Ill.) 143, 12 Am. Dec. 151. See "*Partnership*," *Dec. Dig. (Key No.)* § 143; *Cent. Dig.* §§ 229-233½.

<sup>28</sup> *Walker v. Yellow Poplar Lumber Co. (Ky.)* 35 S. W. 272; *Pier-son v. Hooker*, 3 Johns. (N. Y.) 68, 3 Am. Dec. 467; *Hawn v. Seventy-Six Land & Water Co.*, 74 Cal. 418, 16 Pac. 196. Compare, however, *Niemann v. Niemann*, 43 Ch. D. 198. See "*Partnership*," *Dec. Dig. (Key No.)* § 148; *Cent. Dig.* § 233.

<sup>29</sup> *Innes v. Stephenson*, 1 Moo. & Ry. 145; *Cannon v. Wildman*,

power, namely, the power to mortgage firm property to pay firm debts, has already been discussed.<sup>20</sup> These limitations upon the power to mortgage will be found to apply equally well to the power to pay debts in general. The firm will be bound by actual payments by one partner, by his tenders of payment, and by his refusals to pay a creditor upon demand.<sup>21</sup> But a partner has no authority to pay his private debts with partnership funds, or out of partnership property.<sup>22</sup> An agreement by one partner, whereby his own separate creditor is induced to accept firm goods in discharge of the debt, is not binding on the other partners, who may sue for the value of the property thus turned over; nor is it material that the goods would not have otherwise been purchased.<sup>23</sup>

A situation similar to the one just described, but essentially different, should be distinguished: An agreement by one partner and a third person, whereby the latter purchases firm goods and agrees to pay for them in something

28 Conn. 472; *Osborn v. Osborn*, 36 Mich. 48. See "*Partnership*," *Dec. Dig. (Key No.)* § 143; *Cent. Dig.* §§ 229-233½.

<sup>20</sup> See ante, chapter V, § 96, p. 294.

<sup>21</sup> *Wyckoff v. Anthony*, 9 Daly (N. Y.) 417; *Douglas v. Patrick*, 3 Term R. 683; *Peirse v. Bowles*, 1 Starkie, 323.

The effect of a release by one joint debtor upon the liability of his co-obligors has been discussed in chapter IV, §§ 70, 80, pp. 220, 258. See "*Partnership*," *Dec. Dig. (Key No.)* § 143; *Cent. Dig.* §§ 229-233½.

<sup>22</sup> *JANNEY v. SPRINGER*, 78 Iowa, 617, 43 N. W. 461, 16 Am. St. Rep. 460, *Gilmore, Cas. Partnership*, 243; *Cannon v. Lindsey*, 85 Ala. 198, 3 South. 676, 7 Am. St. Rep. 38; *Blake v. Third Nat. Bank of St. Louis*, 219 Mo. 644, 118 S. W. 641.

If the same person is creditor of the firm and of a separate partner, payments by the latter with partnership funds will be applied on the firm debt. *Campbell v. Mathews*, 6 Wend. (N. Y.) 551; *Downing v. Linville*, 3 Bush (Ky.) 472. Also, if the same person is debtor to the firm and to a separate partner, payments by the debtor will be applied first in discharge of the firm. *Eaton v. Whitcomb*, 17 Vt. 641; *Scott v. Trent*, 1 Wash. (Va.) 77.

See, also, chapter IV, § 80, p. 258, on appropriation of payments. See "*Partnership*," *Dec. Dig. (Key No.)* § 144; *Cent. Dig.* §§ 234-239.

<sup>23</sup> *Harper v. Wrigley*, 48 Ga. 495; *Todd v. Lorah*, 75 Pa. 155; *Cadwallader v. Kroesen*, 22 Md. 200. See "*Partnership*," *Dec. Dig. (Key No.)* § 144; *Cent. Dig.* §§ 234-239.

other than money, as, for example, labor or goods, is binding on the firm, provided the labor or goods are of a sort as would be used within the scope of the firm business and are supplied for the firm, and without notice of any design by the partner with whom the contract was made to appropriate them for his own private use.<sup>84</sup>

### SAME—POWER TO INSTITUTE AND CONDUCT LEGAL PROCEEDINGS

103. A partner has implied power to resort to the ordinary legal proceedings proper for collecting the firm debts, and for defending suits brought against the firm; but he has no implied power to submit a firm controversy to arbitration, nor to confess judgment on behalf of the firm.

The power to collect debts implies with it a power to resort to the ordinary legal process proper for that purpose. Thus one partner may employ attorneys to sue in behalf of the firm, and may execute a power of attorney under seal for that purpose, notwithstanding the general rule denying to one partner the power to execute sealed instruments in the firm name.<sup>85</sup> It is not necessary that the partner should have the consent of the others in order to sue in the name of all; but, if he sues against their consent, he should indemnify them against the costs.<sup>86</sup> Conversely, a partner

<sup>84</sup> *Warder v. Newdigate*, 11 B. Mon. (Ky.) 174, 52 Am. Dec. 567; *Lemon v. Fox*, 21 Kan. 152; *Liberty Sav. Bank v. Campbell*, 75 Va. 534; *White v. Toles*, 7 Ala. 569. See "*Partnership*," *Dec. Dig. (Key No.)* §§ 143, 144; *Cent. Dig.* §§ 229-239.

<sup>85</sup> *In re Barrett*, 2 Hughes, 444, Fed. Cas. No. 1,043; *Wheatley v. Tutt*, 4 Kan. 240. Any partner has the right to use the firm name in perfecting a mechanic's lien for the firm. *Jones v. Hurst*, 67 Mo. 568; *German Bank v. Schloth*, 59 Iowa, 316, 13 N. W. 314. See "*Partnership*," *Dec. Dig. (Key No.)* § 143; *Cent. Dig.* §§ 229-233½; "*Mechanics' Liens*," *Dec. Dig. (Key No.)* § 155; *Cent. Dig.* § 185.

<sup>86</sup> *Kuhn v. Weil*, 73 Mo. 213; *Ward v. Barber*, 1 E. D. Smith (N. Y.) 423; *Whitehead v. Hughes*, 2 Crompt. & M. 318. See "*Partnership*," *Dec. Dig. (Key No.)* § 191; *Cent. Dig.* § 350.

who has the implied power to sue on behalf of the firm has power to defend actions brought against it, and to employ counsel for the purpose of entering an appearance.<sup>37</sup> Such an appearance, however, binds the partners as partners, not individually; so that a judgment rendered against the partnership would not, by virtue of the appearance merely, be binding upon an individual partner in another jurisdiction, who never authorized it.<sup>38</sup>

*Same—Arbitration and Confession of Judgment*

The power of a partner to resort to legal process in order to collect debts owed the firm, and to defend suits brought against it, does not include proceedings which are unusual. Thus, a partner cannot, without express authorization, bind his copartners by the submission of a firm controversy to arbitration.<sup>39</sup> The same considerations apply even more strongly to confessions of judgment by one partner in behalf of the firm; the cases uniformly denying the implied power of the partner to bind others than himself thereby.<sup>40</sup>

<sup>37</sup> *Bennett v. Stickney*, 17 Vt. 531; *Wheatley v. Tutt*, 4 Kan. 240. See "*Partnership*," *Dec. Dig. (Key No.)* §§ 128, 191, 204; *Cent. Dig.* §§ 193, 381.

<sup>38</sup> *Phelps v. Brewer*, 9 Cush. (Mass.) 390, 57 Am. Dec. 58. See, also, *Hall v. Lanning*, 91 U. S. 160, 23 L. Ed. 271; *Haslet v. Street*, 2 McCord (S. C.) 310, 13 Am. Dec. 724, and note.

For liability of partnership, where one partner commits trespass, malicious prosecution, etc., in enforcing partnership demands, see post, § 109, p. 330. See "*Partnership*," *Dec. Dig. (Key No.)* § 204; *Cent. Dig.* § 381.

<sup>39</sup> *Buchanan v. Curry*, 19 Johns. (N. Y.) 137, 10 Am. Dec. 200; *Buchoz v. Grandjean*, 1 Mich. 367; *Fancher v. Bibb Furnace Co.*, 80 Ala. 481, 2 South. 268; *Walker v. Bean*, 34 Minn. 427, 26 N. W. 232; *St. Martin v. Thrasher*, 40 Vt. 460. "The authority to bind a partner to submit to arbitration does not flow from the relation of partnership; and, when it is relied upon, it must, like every other authority, be proved either by express evidence or by such circumstances as lead to the presumption of such authority having been conferred." See Baron Parke, in *Adams v. Bankart*, 1 Cr. M. & R. 681, 686. But see *Gay v. Waltman*, 89 Pa. 453, and *Hallack v. March*, 25 Ill. 48, holding parol submission to arbitration to be valid. See, also, *Alexander v. Mulhall*, 1 Posey, Unrep. Cas. (Tex.) 764 (1881). See "*Partnership*," *Dec. Dig. (Key No.)* § 148½; *Cent. Dig.* § 258.

<sup>40</sup> *MORGAN v. RICHARDSON*, 16 Mo. 409, 57 Am. Dec. 235, *Gilmore, Cas. Partnership*, 370; *Hall v. Lanning*, 91 U. S. 160, 23 L.

## SAME—POWER TO RECEIVE NOTICE

104. One partner has implied authority to receive notice for all his copartners as to matters within the scope of the partnership business, and his authority and his knowledge is the knowledge of all within the same limits.

Just as, in the law of agency, notice given to an agent in the course of his employment will bind the principal, so notice to one partner of any matter relating to the business of the firm is notice to all the other members.<sup>41</sup> Thus, where a firm is the maker of a note or acceptor of a bill, presentation or demand of payment on one partner is sufficient to charge indorsers.<sup>42</sup> Or, if a firm is an indorser of a note or bill, notice of nonpayment or protest served upon one partner is sufficient to bind the others.<sup>43</sup> Likewise

Ed. 271; *Remington v. Cummings*, 5 Wis. 138; *Soper v. Fry*, 37 Mich. 236; *Hier v. Kaufman*, 134 Ill. 215, 25 N. E. 517; *Boyd v. Thompson*, 153 Pa. 78, 25 Atl. 769, 34 Am. St. Rep. 685. But see, as to creditors' right to object, *McCormick Harvesting Mach. Co. v. Coe*, 53 Ill. App. 488. Nor can one partner give a cognovit to pay the firm debt and costs. *Rathbone v. Drakeford*, 4 Moo. & P. 57, and 6 Bing. 375. See "*Partnership*," *Dec. Dig. (Key No.)* § 150; *Cent. Dig.* §§ 259-266.

<sup>41</sup> *Mechem, Agency*, § 718; *Tucker v. Cole*, 54 Wis. 539, 11 N. W. 703; *HUBBARD v. GALUSHA*, 23 Wis. 398; *Haywood v. Harmon*, 17 Ill. 477; *Holbrook v. Wight*, 24 Wend. (N. Y.) 169, 35 Am. Dec. 607; *Miller v. Perrine*, 1 Hun (N. Y.) 620; *Hubbardston Lumber Co. v. Bates*, 31 Mich. 158; *Howland v. Davis*, 40 Mich. 545; *McClurkan v. Byers*, 74 Pa. 405; *Stockdale v. Keyes*, 79 Pa. 251. See "*Partnership*," *Dec. Dig. (Key No.)* § 159; *Cent. Dig.* §§ 293-295.

<sup>42</sup> *Mt. Pleasant Branch of State Bank v. McLeran*, 26 Iowa, 306; *Erwin v. Downs*, 15 N. Y. 575.

Also, notice to take depositions served upon one partner is sufficient. *Spaulding v. Ludlow Woolen Mill*, 36 Vt. 150. Notice of appeal given to one partner is notice to all. *Miller v. Perrine*, 1 Hun (N. Y.) 620. Demand upon and refusal by one partner is sufficient to establish conversion. *Nisbet v. Patton*, 4 Rawle (Pa.) 120, 26 Am. Dec. 122. See "*Partnership*," *Dec. Dig. (Key No.)* §§ 146, 159; *Cent. Dig.* §§ 254, 293-295.

<sup>43</sup> *Hume v. Watt*, 5 Kan. 34; *Nott v. Daumling*, 6 La. 684. See "*Partnership*," *Dec. Dig. (Key No.)* § 146; *Cent. Dig.* § 254.

knowledge of one partner is knowledge of all. For example, where partners took a mortgage on land, and one partner knew of a prior mortgage upon it, this was notice to all.<sup>44</sup> Or, where a firm bought logs, and then sought to rescind the contract because they claimed it was represented that the logs were afloat, they were held, as it appeared that one partner knew the logs were not afloat, and his knowledge was binding on all.<sup>45</sup>

It is only, however, where the partner is acting within the scope of the firm business and within his authority that notice to him is notice to his copartners.<sup>46</sup> Knowledge of a partner obtained outside the scope of the firm business is not imputed to his copartners.<sup>47</sup> Where a partner commits a fraudulent act beyond the scope of the firm business, which is a fraud upon his copartners as well as upon third parties, knowledge of such fraud is not chargeable to the innocent partners.<sup>48</sup> Or, if a partner misuses trust funds in the firm business, his guilty knowledge is not imputed to his copartners.<sup>49</sup>

<sup>44</sup> *Watson v. Wells*, 5 Conn. 468; *Herbert v. Odlin*, 40 N. H. 267. See "Partnership," *Dec. Dig. (Key No.)* § 159; *Cent. Dig.* §§ 293-295.

<sup>45</sup> *Hubbardston Lumber Co. v. Bates*, 31 Mich. 158. Further cases: *Bigelow v. Henniger*, 33 Kan. 362, 6 Pac. 593; *Tucker v. Bradley*, 33 Vt. 324. See "Partnership," *Dec. Dig. (Key No.)* § 159; *Cent. Dig.* §§ 293-295.

<sup>46</sup> *Bignold v. Waterhouse*, 1 M. & S. 255; *Coon v. Pruden*, 25 Minn. 105. See "Partnership," *Dec. Dig. (Key No.)* § 159; *Cent. Dig.* §§ 293-295.

<sup>47</sup> *German Sav. Bank v. Wulfekuhler*, 19 Kan. 60; *Atlantic State Bank of City of Brooklyn v. Savery*, 82 N. Y. 201. See "Partnership," *Dec. Dig. (Key No.)* § 159; *Cent. Dig.* §§ 293-295.

<sup>48</sup> *GILRUTH v. DECELL*, 72 Miss. 232, 16 South. 250, *Gilmore, Cas. Partnership*, 401. See "Partnership," *Dec. Dig. (Key No.)* § 154; *Cent. Dig.* § 276.

<sup>49</sup> *Blenenstok v. Ammlown*, 155 N. Y. 47, 49 N. E. 321. But see *Randall v. Knevals*, 27 App. Div. 146, 50 N. Y. Supp. 748; *Cunningham v. Woodbridge*, 76 Ga. 302. See, further post, §§ 111, 113, pp. 333, 337, for discussion of liability of partnership for the fraud and misconduct of a partner. See "Partnership," *Dec. Dig. (Key No.)* § 159; *Cent. Dig.* §§ 293-295.

### SAME—POWER TO MAKE ADMISSIONS AND REPRESENTATIONS

105. Each partner has implied power to bind the firm by admissions or representations made during the continuance of the partnership concerning the partnership affairs and in the ordinary course of the partnership business. But the statements or admissions of one partner, unless authorized or ratified, are not admissible as evidence to prove either the existence of the partnership or that a given transaction was a partnership transaction.

Where there has been prima facie proof of the existence of the partnership, each partner has implied power to bind his copartners by admissions or declarations made concerning matters within the scope of the partnership business and within his power as agent for the firm.<sup>50</sup> Thus, where one partner, during the continuance of the partnership, acknowledges a debt as due by the partnership, he binds the firm as by a promise.<sup>51</sup> Or an admission by a partner that he set fire to certain firm property is competent to defeat an action by the partners to recover the insurance.<sup>52</sup> This

<sup>50</sup> *Franklin v. Hoadley*, 115 App. Div. 538, 101 N. Y. Supp. 374; *Carls v. Nimmons*, 92 Mo. App. 66; *Collett v. Smith*, 143 Mass. 473, 10 N. E. 173; *Western Assur. Co. v. Towle*, 65 Wis. 247, 26 N. W. 104; *Munson v. Wickwire*, 21 Conn. 513.

An admission by a dormant partner has been held to be binding. *Kaskaskia Bridge Co. v. Shannon*, 6 Ill. 15; *Weed v. Kellogg*, 6 McLean, 44, Fed. Cas. No. 17,345.

As to admissions waiving the statute of limitations after the dissolution of the firm, see *SAGE v. ENSIGN*, 2 Allen (Mass.) 245; *Kallenbach v. Dickinson*, 100 Ill. 427, 39 Am. Rep. 47; and post, § 118. See "*Partnership*," *Dec. Dig. (Key No.)* §§ 152, 153, 278; *Cent. Dig.* §§ 272, 273, 277, 630; "*Evidence*," *Dec. Dig. (Key No.)* § 249; *Cent. Dig.* §§ 965-975.

<sup>51</sup> *BURGAN v. LYELL*, 2 Mich. 102, 55 Am. Dec. 53, Gilmore, Cas. Partnership, 358. See "*Partnership*," *Dec. Dig. (Key No.)* § 152; *Cent. Dig.* §§ 272, 273; "*Evidence*," *Dec. Dig. (Key No.)* § 249; *Cent. Dig.* §§ 965-975.

<sup>52</sup> *Western Assur. Co. v. Towle*, 65 Wis. 247, 26 N. W. 104. See

power does not differ materially from that of other agents to bind their principals by admissions. Just as, in the law of agency, the existence of the relation of principal and agent must be shown by other independent evidence before the admission of the agent will be received, so must it be proved by satisfactory extraneous evidence that the parties charged are partners, before the admission or representation of the alleged partner will have effect to bind others than himself.<sup>53</sup> Thus a declaration of one man that another is his partner is not competent to prove a partnership.<sup>54</sup> Nor are the admissions of a partner competent to prove that a particular transaction is a partnership affair. Thus, where a firm was sued on a note made by a partner in the firm name, the plaintiff was not allowed to put in evidence the statements of that partner that the note was a partnership transaction.<sup>55</sup> Nor are the declarations of a partner as to the scope of his own authority competent to prove such authority.<sup>56</sup>

The effect of an admission or declaration by one partner is not necessarily conclusive, but is governed by the rules applicable to admission by agents in general.<sup>57</sup> Where,

*"Partnership," Dec. Dig. (Key No.) § 152; Cent. Dig. §§ 272, 273; "Evidence," Dec. Dig. (Key No.) § 249; Cent. Dig. §§ 965-975.*

<sup>53</sup> *Oppenheimer v. Clemmons* (C. C.) 18 Fed. 886; *Hahn v. St. Clair Sav. & Ins. Co.*, 50 Ill. 456; *Union Nat. Bank v. Underhill*, 102 N. Y. 336, 7 N. E. 293; *Boor v. Lowrey*, 103 Ind. 468, 3 N. E. 151, 53 Am. Rep. 519; *Reynolds v. Radke*, 112 Ill. App. 575; *Taft v. Church*, 162 Mass. 527, 39 N. E. 283. But the partner's actual testimony in the trial, as distinguished from his extrajudicial admissions, to the fact of partnership, is competent. *First Nat. Bank of Wausau v. Conway*, 67 Wis. 210, 30 N. W. 215. See *"Evidence," Dec. Dig. (Key No.) § 259; Cent. Dig. § 1009.*

<sup>54</sup> *Hahn v. St. Clair Sav. & Ins. Co.* 50 Ill. 456; *Taft v. Church*, 162 Mass. 527, 39 N. E. 283. See *"Partnership," Dec. Dig. (Key No.) § 46; Cent. Dig. §§ 69-71.*

<sup>55</sup> *TUTTLE v. COOPER*, 5 Pick. (Mass.) 414; *Lockwood v. Beckwith*, 6 Mich. 168, 72 Am. Dec. 69. See *"Partnership," Dec. Dig. (Key No.) § 46; Cent. Dig. §§ 69-71; "Evidence," Dec. Dig. (Key No.) § 249; Cent. Dig. §§ 965-975.*

<sup>56</sup> *Thomas v. Harding*, 8 Me. 417; *Heffron v. Hanaford*, 40 Mich. 305. See *"Partnership," Dec. Dig. (Key No.) § 152; Cent. Dig. §§ 272, 273; "Evidence," Dec. Dig. (Key No.) § 249; Cent. Dig. §§ 965-975.*

<sup>57</sup> *Hollis v. Burton*, 8 Ch. 226; *RAPP v. LATHAM*, 2 B. & Ald.

however, third persons have been induced, by representations within the implied authority of the party making them, to alter their condition to their disadvantage, a conclusive estoppel against the firm may be raised. Where one partner represented that certain flour was bought on account of a third person, and that the firm's interest in it was limited by the amount advanced by them in making the purchase, the members of the firm were not allowed to assert their ownership as against one who had purchased of such third person.<sup>58</sup> So, also, where one partner receives for his firm plaintiff's money, representing that he will invest it in a particular mortgage and paying the plaintiff sums from time to time as interest thereon, the firm is estopped to deny the representations.<sup>59</sup>

### SAME—MISCELLANEOUS POWERS

**106.** In addition to the foregoing enumerated powers, there are various miscellaneous powers which are usually incident to every partnership. The nature and extent of these powers are to be determined by the facts and circumstances of each particular partnership.

It remains only to mention a few more instances of the powers of partners, which, while not important enough for extended discussion, are governed by no different principles than those already mentioned. A partner has power to bind the firm by an account rendered,<sup>60</sup> by varying a contract

795. See "Partnership," *Dec. Dig. (Key No.)* § 152; *Cent. Dig.* §§ 272, 273; "Evidence," *Dec. Dig. (Key No.)* § 249; *Cent. Dig.* §§ 965-975.

<sup>58</sup> *Bemis v. Becker*, 1 Kan. 226. See "Partnership," *Dec. Dig. (Key No.)* §§ 152, 155, 156; *Cent. Dig.* §§ 272, 273, 278-281.

<sup>59</sup> *Blair v. Bromley*, 2 Phillips, 354; *Griswold v. Haven*, 25 N. Y. 595, 82 Am. Dec. 380; *Coleman v. Pearce*, 26 Minn. 123, 1 N. W. 846. See "Partnership," *Dec. Dig. (Key No.)* §§ 152, 155, 156; *Cent. Dig.* §§ 272, 273, 278-281.

<sup>60</sup> *BURGAN v. LYELL*, 2 Mich. 102, 55 Am. Dec. 53, *Gilmore, Cas. Partnership*, 358; *Cady v. Kyle*, 47 Mo. 346; *Gulick v. Gulick*, 14 N. J. Law, 578; *Fergusson v. Fyffe*, 8 Clark & F. 121. Where one

previously made by all,<sup>61</sup> by the appointment of an agent or servant,<sup>62</sup> by assenting to a deed of a debtor for the benefit of his creditors,<sup>63</sup> by assenting to a transfer of a debt,<sup>64</sup> by a penalty,<sup>65</sup> by accepting security for a debt,<sup>66</sup> by insuring firm property, by settling the loss with the insurance company, or by consenting to the cancellation of a policy.<sup>67</sup> All these are within the implied powers of a partner.

firm succeeds another, a statement of the indebtedness of each of the firms, rendered to third persons during the existence of the new firm, is as to each firm binding on one who, as a partner, is individually liable for the debts of both firms, when such statement is so made by one acting as his managing agent in both firms during their existence. *Waite v. High*, 96 Iowa, 742, 65 N. W. 397. See "*Account Stated*," *Cent. Dig.* § 20.

<sup>61</sup> *Hillock v. Traders' Ins. Co.*, 54 Mich. 532, 20 N. W. 571; *Leiden v. Lawrence*, 2 New Reports, 283. But see *Detroit v. Robinson*, 42 Mich. 198, 3 N. W. 845; *Horn v. Newton City Bank*, 32 Kan. 518, 4 Pac. 1022. See "*Partnership*," *Dec. Dig. (Key No.)* § 139; *Cent. Dig.* § 213.

<sup>62</sup> *Durgin v. Somers*, 117 Mass. 55; *Mead v. Shepard*, 54 Barb. (N. Y.) 474; *BURGAN v. LYELL*, 2 Mich. 102, 55 Am. Dec. 53, *Gilmore, Cas. Partnership*, 358; *Sweeney v. Neely*, 53 Mich. 421, 19 N. W. 127; *Burleigh v. White*, 70 Me. 130; *Barcroft v. Haworth*, 29 Iowa, 462. See "*Partnership*," *Dec. Dig. (Key No.)* § 140; *Cent. Dig.* § 212.

<sup>63</sup> *Dudgeon v. O'Connell*, 12 Ir. Eq. 566; *Morans v. Armstrong, Arms., M. & O.* 25. See "*Partnership*," *Dec. Dig. (Key No.)* §§ 125-164; *Cent. Dig.* §§ 190-300.

<sup>64</sup> *Beale v. Caddick*, 2 Hurl. & N. 326; *Backhouse v. Charlton*, 8 Ch. Div. 444.

<sup>65</sup> *Beckham v. Drake*, 9 Mees. & W. 79.

<sup>66</sup> *Tomlins v. Lawrence*, 3 Moore & P. 555. See "*Partnership*," *Dec. Dig. (Key No.)* § 143; *Cent. Dig.* § 230.

<sup>67</sup> *Graves v. Ins. Co.*, 2 Cranch; 439, 2 L. Ed. 324; *Clement v. Fire Ins. Asso.*, 141 Mass. 298, 5 N. E. 847; *Hillock v. Traders' Ins. Co.*, 54 Mich. 531, 20 N. W. 571; *BROWN v. HARTFORD FIRE INS. CO.*, 117 Mass. 479, *Gilmore, Cas. Partnership*, 151; *Hunt v. Royal Assur. Co.*, 5 Maule & S. 47. See "*Partnership*," *Dec. Dig. (Key No.)* §§ 125-164; *Cent. Dig.* §§ 190-300; "*Insurance*," *Cent. Dig.* § 1342.

**POWER TO SUBJECT FIRM TO TORT LIABILITY**

107. A partner, acting in the ordinary course of the business of the firm, or beyond it, if with the express or implied authority of his copartners, may render his copartners liable in tort for any loss or injury caused by such action to any person not a member of the firm, or for any penalty incurred by any wrongful act or omission of such partner.

*In General*

The law of partnership with respect to the powers of partners to bind one another is generally recognized as governed by the doctrines of the law of agency. Consequently the general scope of the business, which has been adopted from the law of agency to mark the limitations on the partner's implied power to bind his copartners in contract, also applies to the liability of the firm for the torts of a partner. When a tort is committed by a partner acting within the scope of the firm business, the partners are jointly and severally liable for the consequences of such tort.<sup>88</sup> Thus, where one partner borrows a horse for the use of the firm business, and negligently loses it, the owner may recover therefor against his copartners.<sup>89</sup> Or where one partner, while driving in the course of the firm business, negligently ran over the plaintiff, each partner is li-

<sup>88</sup> *Helm v. McCaughan*, 32 Miss. 17, 66 Am. Dec. 588; *Hess v. Lowrey*, 122 Ind. 225, 23 N. E. 156, 7 L. R. A. 90, 17 Am. St. Rep. 355; *Wood v. Luscomb*, 23 Wis. 287. See an exhaustive note in 51 L. R. A. 463-496.

The English Partnership Act of 1890, § 10, provides: "Where, by any wrongful act or omission of any partner acting in the ordinary course of the business of the firm, or with the authority of his copartners, loss or injury is caused to any person not being a partner in the firm, or any penalty is incurred, the firm is liable therefor to the same extent as the partner so acting or omitting to act." See "*Partnership*," *Dec. Dig. (Key No.)* §§ 153, 174; *Cent. Dig.* §§ 274-277, 306.

<sup>89</sup> *Witcher v. Brewer*, 49 Ala. 119. See "*Partnership*," *Dec. Dig. (Key No.)* §§ 153, 174; *Cent. Dig.* §§ 274, 306.

able.<sup>70</sup> So, also, a firm of butchers, one member of which, in furtherance of the partnership, places poisoned meat where dogs might reasonably be expected to get it, is liable to an owner of a dog which dies from eating such meat.<sup>71</sup> If the tort is committed by the partner in the ordinary course of the firm business, the others are liable therefor, even though they may have used every effort to prevent the wrong, or may have expressly forbidden it.<sup>72</sup>

On the other hand, the firm will not be liable for the torts of a partner committed while acting outside of the scope of his authority.<sup>73</sup> Thus a copartner is not responsible for the conversion of a third person's property by one partner to his own individual use.<sup>74</sup> Nor is it within the ordinary course of business of a drug firm to give away drugs, so that any liability for the negligence of the partner mixing the drugs is his alone.<sup>75</sup>

<sup>70</sup> CHAMPION v. BOSTWICK, 18 Wend. (N. Y.) 175, 81 Am. Dec. 376. See "Partnership," Dec. Dig. (Key No.) §§ 153, 174; Cent. Dig. §§ 274, 306.

<sup>71</sup> Dudley v. Love, 60 Mo. App. 420. See "Partnership," Dec. Dig. (Key No.) §§ 153, 174; Cent. Dig. §§ 274-277, 306.

<sup>72</sup> Collman v. Mills, [1897] 1 Q. B. 396; Limpus v. London General Omnibus Co., 1 H. & C. 526; ATTORNEY GENERAL v. STRANFORTH, Bunb. 97. See "Partnership," Dec. Dig. (Key No.) §§ 153, 174; Cent. Dig. §§ 274-277, 306.

<sup>73</sup> Stockwell v. United States, 3 Cliff. 284, Fed. Cas. No. 13,466; Cooley, Torts, pp. 533, 536. See "Partnership," Dec. Dig. (Key No.) §§ 153, 174; Cent. Dig. §§ 274-277, 306.

<sup>74</sup> Stokes v. Burney, 3 Tex. Civ. App. 219, 22 S. W. 126; Townsend v. Hagar, 19 C. C. A. 256, 72 Fed. 949. Even though had the tort-feasor not been connected with the firm, he might not have been in a position to commit the wrong. Sherwood v. Marwick, 5 Me. 295; PIERCE v. JACKSON, 6 Mass. 242. Cf., also, Manufacturers' & Mechanics' Bank v. Gore, 15 Mass. 75, 81, 8 Am. Dec. 83; Reynolds v. Waller's Heir, 1 Wash. (Va.) 164. See "Partnership," Dec. Dig. (Key No.) §§ 153, 174; Cent. Dig. §§ 274-277, 306.

<sup>75</sup> Gwynn v. Duffield, 66 Iowa, 708, 24 N. W. 523, 55 Am. Rep. 286. But all the members of a firm of lawyers or doctors are liable for the negligent advice furnished for pay by one of them to a client of the firm. Blyth v. Fladgate, [1891] 1 Ch. 337; Haley v. Case, 142 Mass. 316, 7 N. E. 877; Hess v. Lowrey, 122 Ind. 225, 23 N. E. 156, 7 L. R. A. 90, 17 Am. St. Rep. 355. See, also, Rhodes v. Moules, [1895] 1 Ch. 236; Dudley v. Love, 60 Mo. App. 420. See "Partnership," Dec. Dig. (Key No.) §§ 153, 174; Cent. Dig. §§ 274-277, 306.

While each partner is agent for his copartners, and binds them by his acts, he also binds himself as principal. The agency is peculiar, in that the partner is both an agent and a principal. For this reason the doctrine of agency known as the "fellow servant rule" does not apply where one partner negligently injures an employé of the firm while working with him. Both partners are liable for the injuries thus inflicted.<sup>76</sup>

Where a partner expressly authorizes the commission of a tort, he is, of course, liable, though the tort be beyond the scope of the business of the firm. Subsequent adoption of the wrongful act of one partner, or receipt of its benefits, will render the other partners equally liable.<sup>77</sup> Where partners join in the commission of a tort, they are liable as joint tort-feasors, and not because of being partners.<sup>78</sup>

*Same—Willful Tort*

It is sometimes said that a firm is not liable for the willful tort of a partner; but an examination of the cases makes it clear that, if the firm is relieved from liability in such situations, it is not because the tort in question is willful, but because, as in the case of a malicious arrest, for example,<sup>79</sup> by one partner, it is outside of the scope of the partnership business. While willful acts tend to fall outside the scope of a partner's power, nevertheless, if, while acting within the scope of his authority, a partner will-

<sup>76</sup> *ASHWORTH v. STANWIX*, 3 E. & E. 701, 7 Jur. N. S. 467. See "*Partnership*," *Dec. Dig. (Key No.)* §§ 153, 174; *Cent. Dig.* §§ 274-277, 306.

<sup>77</sup> *Durant v. Rogers*, 87 Ill. 508; *United States v. Baxter* (O. C.) 46 Fed. 350; *Blenenstok v. Ammidown*, 11 Misc. Rep. 76, 29 N. Y. Supp. 593. A subsequent approval will not render a partner liable for a trespass by his copartner, unless the taking of property which constitutes the trespass was available to the firm. *Grund v. Van Vleck*, 69 Ill. 478. See "*Partnership*," *Dec. Dig. (Key No.)* §§ 153, 174; *Cent. Dig.* §§ 274-277, 306.

<sup>78</sup> *Graham v. Meyer*, 4 Blatchf. 129, Fed. Cas. No. 5,673, 24 Meyer, Fed. Dec. 131. For parties to action ex delicto against a firm, see ante, chapter IV, § 75, p. 236, and post, chapter IX, § 181, p. 549. See "*Partnership*," *Dec. Dig. (Key No.)* §§ 153, 174; *Cent. Dig.* §§ 274-277, 306.

<sup>79</sup> See post, § 109, p. 330.

fully causes injury to another, his copartners are liable. If, for instance, one partner in an omnibus transfer firm, while driving a coach, should willfully run into his competitor's coach, in order to prevent him from picking up a particular passenger whom he himself desired, the willfulness of the one partner's act would not per se relieve his copartners from liability.<sup>80</sup>

### SAME—ILLEGAL ACTS—PENALTIES AND CRIMES

108. Whether innocent partners are civilly liable for illegal acts or omissions of a copartner in the course of the firm business is a question on which the cases are divided. Some hold that an illegal act is per se beyond the scope of the firm business, and hence innocent partners are not civilly liable for it; others hold that an illegal act or omission may occur in the performance of acts within the scope of the firm business, and, if so, all the partners are civilly answerable therefor.

Except in the case of certain statutory crimes, a partner is not criminally liable for the acts of his copartner, unless he expressly or impliedly authorized them.

#### *Illegal Acts*

A leading case has held that acts which are illegal as being contrary to a statute will not be regarded as within the scope of the business, so as to charge the other partners by construction merely.<sup>81</sup> In this case the court re-

<sup>80</sup> *Limpus v. London General Omnibus Co.*, 1 H. & C. 526; *Morton v. Hardern*, 4 B. & C. 223, 10 E. C. L. 316; *CHAMPION v. BOSTWICK*, 18 Wend. (N. Y.) 175, 31 Am. Dec. 376.

A full discussion of liability of a principal for the willful torts of his agent will be found in works on Agency. See *Tiffany on Agency*, pp. 269-274. See "*Partnership*," *Dec. Dig. (Key No.)* §§ 153, 174; *Cent. Dig.* §§ 274-277, 306.

<sup>81</sup> *Graham v. Meyer*, 4 Blatchf. 129, Fed. Cas. No. 5,673. See *Bur-*

fused to hold to liability in conversion the innocent members of a partnership whose business was lending money, and for whose purposes one partner had taken a chattel mortgage on a steamboat to secure a usurious loan void by statute.<sup>82</sup> If the innocent copartners are not liable, the true ground of their immunity is, not because the act is illegal, but because it is beyond the scope of the partnership business, and hence beyond the partner's power. Illegal acts are quite likely to be outside the scope of the firm business; but illegality per se does not make an act unauthorized. Just as in the case of willful or malicious torts, it is entirely possible for them to be committed by a partner while acting within the scope of his power. It would seem, therefore, that for the act or omission of a partner in the course of the firm business each member of the firm should be civilly liable, whether that act be negligent merely, or willful, or illegal.<sup>83</sup> Thus in *Tenney v. Foote*<sup>84</sup> a firm was held liable in tort where one partner, in the firm name, made an illegal option or gaming contract for trading on the board of trade. Similarly it is not necessary for a member of a partnership which is conducting a quarrying business to assent in his partnership capacity to the firing of a blast, to render himself liable for the violation of a municipal ordinance forbidding such firing.<sup>85</sup>

It must be recognized, however, that there are many

dick, *Torts* (2d Ed.) pp. 212-214, for a criticism of this holding. See "*Partnership*," *Dec. Dig. (Key No.)* § 153; *Cent. Dig.* § 274.

<sup>82</sup> See, also, *Schreiber v. Sharpless* (D. C.) 6 Fed. 175. See "*Partnership*," *Dec. Dig. (Key No.)* §§ 153, 174; *Cent. Dig.* §§ 274-276, 306.

<sup>83</sup> *ATTORNEY GENERAL v. STRANYFORTH*, Bunbury, 97; *Stockwell v. United States*, 13 Wall. 531, 547-548, 20 L. Ed. 491; *Warner v. Griswold*, 8 Wend. (N. Y.) 665; *Lockwood v. Bartlett*, 130 N. Y. 340, 29 N. E. 257; *Crumless v. Sturgess*, 6 Helsk. (Tenn.) 190; *Allen v. Leighton*, 87 Me. 206, 32 Atl. 877; *Bayles v. Newton*, 50 N. J. Law, 549, 18 Atl. 77; *Hyrne v. Erwin*, 23 S. C. 228, 55 Am. Rep. 15; *Dyer v. Monday* (1895) 1 Q. B. 742.

"In almost every action for negligent driving, an illegal act is imputed to the servant." Per Byles, J., in *Limpus v. London General Omnibus Co.*, 1 H. & C. 528, 541. See "*Partnership*," *Dec. Dig. (Key No.)* §§ 153, 174; *Cent. Dig.* §§ 274-277, 306.

<sup>84</sup> 95 Ill. 99. See "*Partnership*," *Cent. Dig.* § 274.

<sup>85</sup> *City of Spokane v. Patterson* (1907) 46 Wash. 93, 89 Pac. 402,

cases apparently to the effect that illegal acts are per se beyond the scope of a partner's power, and hence do not subject innocent copartners to liability. "An agency or authority to a partner to violate the provisions of a public statute cannot be implied; nor can it be implied that such illegal act is within the scope of the partnership business, which could only exist for lawful purposes."<sup>86</sup> Thus one partner was held not liable for the penalty imposed by statute for "willfully and knowingly" cutting trees of another person, when this was done without his consent or knowledge by his copartner.<sup>87</sup>

With respect to the liability of partners for violations of liquor laws by one partner, there is considerable conflict of authority, the majority relieving the nonacting partner from liability, unless the act was done with his authority or assent. But where the statute prohibits the act in question absolutely, whether by one's own hand or another's, all the partners will be liable.<sup>88</sup>

#### *Same—Crimes*

The mutual agency of partners is not sufficient to render one criminally liable for the acts of the other, though done in the course of the partnership business.<sup>89</sup> One partner may be civilly liable for the other's fraud, but he cannot be

8 L. R. A. (N. S.) 1104, 123 Am. St. Rep. 921. See "*Partnership*," *Dec. Dig. (Key No.)* §§ 153, 174, 175; *Cent. Dig.* §§ 274-277, 306, 307.

<sup>86</sup> *Hutchins v. Turner*, 8 Humph. (Tenn.) 415; *Marks v. Hastings*, 101 Ala. 165, 13 South. 297; *Martin v. Simkins*, 116 Ga. 254, 42 S. E. 483; *Rosenkrans v. Barker*, 115 Ill. 331, 3 N. E. 93, 56 Am. Rep. 169; *Titcomb v. James*, 57 Ill. App. 298; *Bernhelmer v. Becker*, 102 Md. 250, 62 Atl. 526, 3 L. R. A. (N. S.) 221, 111 Am. St. Rep. 356; *Noblett v. Bartsch*, 31 Wash. 24, 71 Pac. 551, 96 Am. St. Rep. 886. See, further, post, pp. 330, 331. See "*Partnership*," *Dec. Dig. (Key No.)* §§ 153, 174, 175; *Cent. Dig.* §§ 274-276, 306, 307.

<sup>87</sup> *Williams v. Hendricks*, 115 Ala. 227, 22 South. 439, 41 L. R. A. 650, 67 Am. St. Rep. 32. See "*Partnership*," *Dec. Dig. (Key No.)* §§ 153, 174; *Cent. Dig.* §§ 274-277, 306.

<sup>88</sup> *Williams v. Hendricks*, supra. Elaborate annotations to the case will be found in 41 L. R. A., at pages 661 and 664. See "*Intoxicating Liquors*," *Dec. Dig. (Key No.)* § 171; *Cent. Dig.* § 185.

<sup>89</sup> *Acree v. Com.*, 13 Bush (Ky.) 353; *Robinson v. State*, 38 Ark. 641; *Whitton v. State*, 37 Miss. 379. See "*Partnership*," *Dec. Dig. (Key No.)* § 175; *Cent. Dig.* § 307.

arrested for it.<sup>90</sup> In order to be criminally liable, the non-acting partner must either assent to or participate in the crime.<sup>91</sup>

### SAME—FALSE ARREST AND MALICIOUS PROSECUTION

109. One partner will not make the others liable for a false arrest or a malicious prosecution, which he institutes for the suspected larceny of partnership property, unless they advise or participate therein, and then only in their individual capacity.

It is well settled, in carrying on ordinary legal proceedings for the collection of firm debts and the protection of firm property, a partner acts within the scope of his power. For his misconduct in this connection all the partners are liable, as where one partner, in attempting to collect a firm debt, causes the goods of the third party to be levied upon, instead of the debtor's goods,<sup>92</sup> or where he seizes the property of a firm debtor on a void judgment against him.<sup>93</sup> He would likewise seem to be acting within the scope of the powers when he causes the arrest or the prosecution of a person suspected of stealing the firm property. The fact that he is prompted by malicious motives should not take the act, otherwise authorized, outside his authority.<sup>94</sup>

While on principle the partners should be liable for malicious arrests or malicious prosecutions caused by one partner, it must be recognized that the authorities are prac-

<sup>90</sup> *McNeely v. Haynes*, 76 N. C. 122; *Watson v. Hinchman*, 42 Mich. 27, 3 N. W. 236. See "Partnership," *Dec. Dig. (Key No.)* § 207; *Cent. Dig.* § 359.

<sup>91</sup> See *Clark & M., Crimes*, 395.

<sup>92</sup> *Kuhn v. Well*, 73 Mo. 213. See "Partnership," *Dec. Dig. (Key No.)* §§ 153, 174; *Cent. Dig.* §§ 274-277, 306.

<sup>93</sup> *Rolfe v. Dudley*, 58 Mich. 208, 24 N. W. 657. See "Partnership," *Dec. Dig. (Key No.)* §§ 153, 174; *Cent. Dig.* §§ 274, 306.

<sup>94</sup> *Staples v. Schmid*, 18 R. I. 224, 26 Atl. 193, 19 L. R. A. 824. See "Partnership," *Dec. Dig. (Key No.)* § 153; *Cent. Dig.* § 274; "Malicious Prosecution," *Dec. Dig. (Key No.)* § 42; *Cent. Dig.* § 83.

tically unanimous in holding the contrary. Thus a partner in an ordinary mercantile house has no implied authority to bind his copartners by his acts in detaining and searching a customer suspected of having stolen firm property.<sup>95</sup> Nor is one partner liable for a malicious prosecution instituted by his copartner on a charge of larceny.<sup>96</sup> Nor on an attachment sued out by his copartner maliciously and without probable cause.<sup>97</sup> With respect to cases of arrest and malicious prosecution, the courts proceed upon the theory that the partner, in bringing suspected criminals to justice, acts not in the performance of any duty owed his copartners, but the community as a whole, and therefore his copartners are not liable. The termination of the prosecution in the defendant's favor imposes no liability on the firm, although the charge was stealing the property of the firm.<sup>98</sup> If, however, a partner advises, directs, or participates in an arrest, although he may not have directly caused it, he will be equally liable in his individual capacity with the partner

<sup>95</sup> *Bernhelmer v. Becker*, 102 Md. 250, 62 Atl. 528, 3 L. R. A. (N. S.) 221, 111 Am. St. Rep. 356; *Rosenkrans v. Barker*, 115 Ill. 331, 3 N. E. 93, 56 Am. Rep. 169. See "*Partnership*," *Dec. Dig. (Key No.)* §§ 153, 174; *Cent. Dig.* §§ 274, 306; "*False Imprisonment*," *Dec. Dig. (Key No.)* § 15; *Cent. Dig.* §§ 61-63.

<sup>96</sup> *Marks v. Hastings*, 101 Ala. 165, 13 South. 297. See "*Partnership*," *Dec. Dig. (Key No.)* §§ 153, 174; *Cent. Dig.* §§ 274, 306; "*Malicious Prosecution*," *Dec. Dig. (Key No.)* § 42; *Cent. Dig.* § 83.

<sup>97</sup> *Swenson v. Erickson*, 90 Ill. App. 358.

It has been held, however, that a partnership may be sued as such in an action for malicious arrest, when the process was sued out in the interest of the partnership, and under the direction of all the members of the partnership. *Page v. Citizens' Banking Co.* (1900) 111 Ga. 73, 36 S. E. 418, 51 L. R. A. 463, 78 Am. St. Rep. 144, and note. See "*Partnership*," *Dec. Dig. (Key No.)* §§ 153, 174; *Cent. Dig.* §§ 274, 306; "*Malicious Prosecution*," *Dec. Dig. (Key No.)* § 42; *Cent. Dig.* § 83.

<sup>98</sup> *Kirk v. Garrett*, 84 Md. 383, 35 Atl. 1089; *Farrell v. Friedlander*, 63 Hun, 254, 18 N. Y. Supp. 215; *Marks v. Hastings*, 101 Ala. 165, 13 South. 297; *Gilbert v. Emmons*, 42 Ill. 143, 89 Am. Dec. 412; *Rosenkrans v. Barker*, 115 Ill. 331, 3 N. E. 93, 56 Am. Rep. 169. See exhaustive note in 51 L. R. A. 463. See "*Partnership*," *Dec. Dig. (Key No.)* §§ 153, 174; *Cent. Dig.* §§ 274, 306; "*False Imprisonment*," *Dec. Dig. (Key No.)* § 15; *Cent. Dig.* §§ 5-67; "*Malicious Prosecution*," *Dec. Dig. (Key No.)* § 42; *Cent. Dig.* §§ 83-86.

who does; but mere passive knowledge of the prosecution will not be enough to render him liable."<sup>2</sup>

### SAME—DEFAMATION

110. Each partner is liable for defamatory statements made by one partner during the continuance of the partnership and in the ordinary course of the partnership business.

In order that the member of a firm may be held responsible for defamation by one partner, it is only necessary that the defamatory statements be made to aid the firm business. Accordingly partners are jointly liable for statements made by one of them in derogation of a competitor. "Each of the partners is an agent of the partnership as an entirety, and if, in the course of that business, he injures the business of another by slander, the partnership is liable therefor, just as it might be for any other tort by any other agent."<sup>1</sup> The partners in a firm publishing a newspaper are all liable for the defamatory matter contained in articles prepared and printed by one.<sup>2</sup> The malicious intention of the partner guilty of the defamation is no defense to his copartners, even in a jurisdiction where by statute the truth of defamatory statements maliciously made cannot be pleaded by the defendant.<sup>3</sup> If, however, the defamatory statements are made by a partner while acting outside the scope of the firm business, the innocent copartners are

<sup>22</sup> *Gilbert v. Emmons*, 42 Ill. 143, 89 Am. Dec. 412; *Kirk v. Garrett*, 84 Md. 383, 35 Atl. 1089. See "Partnership," *Deco. Dig. (Key No.)* §§ 153, 174; *Cent. Dig.* §§ 274, 306; "False Imprisonment," *Deco. Dig. (Key No.)* § 15; *Cent. Dig.* §§ 61-63.

<sup>1</sup> *HANEY MFG. CO. v. PERKINS*, 78 Mich. 1, 43 N. W. 1073, *Gilmore, Cas. Partnership*, 396. See "Partnership," *Deco. Dig. (Key No.)* §§ 153, 174; *Cent. Dig.* §§ 274, 306.

<sup>2</sup> *McDonald v. Woodruff*, 2 Dill. 244, Fed. Cas. No. 8,770. See "Partnership," *Deco. Dig. (Key No.)* §§ 153, 174; *Cent. Dig.* §§ 274, 306.

<sup>3</sup> *Lothrop v. Adams*, 133 Mass. 471, 43 Am. Rep. 528. See "Partnership," *Deco. Dig. (Key No.)* §§ 153, 174; *Cent. Dig.* §§ 274, 306.

not liable. In such case only those actually participating in the slander or authorizing it can be held.<sup>4</sup>

### SAME—FRAUD AND MISREPRESENTATION

111. All the partners are civilly liable for the frauds committed by a copartner in the course of the transactions and business of the partnership, even though they have no connection with, knowledge of, or participation in, the fraud.

The liability of a partnership for the frauds and misrepresentations of its members, in the course of the partnership business, is governed by the same doctrines applicable in the law of agency. By the association of partnership each member holds out his associate to be worthy of confidence in their copartnership dealings. Accordingly, if a partner makes a false representation as to the solvency of a third person, by means of which an innocent third person is induced to accept the note of such third person in payment of goods purchased for the firm, every member of the firm is liable in an action of fraud for the damages resulting.<sup>5</sup> So, also, where a member of a firm engaged in selling pelts fraudulently substituted different and inferior pelts from the ones actually sold, his copartner was held liable.<sup>6</sup>

<sup>4</sup> *Woodling v. Knickerbocker*, 31 Minn. 268, 17 N. W. 387; *Blyth v. Fladgate*, [1891] 1 Ch. 337. See "*Partnership*," *Dec. Dig. (Key No.)* §§ 153, 174; *Cent. Dig.* §§ 274, 306; "*Libel and Slander*," *Cent. Dig.* § 175.

<sup>5</sup> *Hawkins v. Appleby*, 2 Sandf. (N. Y.) 421; *Tenney v. Foote*, 95 Ill. 99; *Peckham Iron Co. v. Harper*, 41 Ohio St. 100. See generally, *Banner v. Schlessinger*, 109 Mich. 262, 67 N. W. 116; *CHESTER v. DICKERSON*, 54 N. Y. 1, 13 Am. Rep. 550; *Gilmore, Cas. Partnership*, 136; *Gill v. First Nat. Bank* (Tex. Civ. App.) 47 S. W. 751. See "*Partnership*," *Dec. Dig. (Key No.)* §§ 153, 174; *Cent. Dig.* §§ 276, 277, 306.

<sup>6</sup> *WOLF v. MILLS*, 56 Ill. 360, *Gilmore, Cas. Partnership*, 397.

In *CHESTER v. DICKERSON*, 54 N. Y. 1, 11, 13 Am. Rep. 550, *Gilmore, Cas. Partnership*, 136, the court said: "It is well settled that the firm is bound for the fraud committed by one partner in the course of the transactions and business of the partnership, even

The firm will, however, not be liable for a fraud committed by a partner on his own individual account.<sup>7</sup> Similarly, where a partner, in attempting to sell, not partnership goods held for the purpose of sale, but the interest of a copartner in the firm, makes fraudulent representations to the prospective purchaser, the copartner whose interest is sold will not be liable therefor, unless he instigates or approves of them, or unless the partner making the representations is actually his agent.<sup>8</sup>

### SAME—CONVERSION AND MISAPPLICATION OF PROPERTY

112. One partner renders his copartners liable: (a) Where, while acting within the scope of the partnership business, he wrongfully converts the property of another; (b) where, while acting within the scope of his apparent authority, he receives the money or property of a third person and misapplies it; (c) where he misapplies money or property received by the firm in the course of its business, while such money or property is in the custody of the firm.

#### *Conversion of Property*

If, while acting within the scope of his authority, a partner deals with property in a way amounting to a conversion of it, all the partners are liable. Thus all the members of a partnership were held responsible for staves made out of timber unlawfully cut by one partner on the plaintiff's land,

when the other partners have not the slightest connection with, or knowledge of, or participation in, the fraud." See "*Partnership*," *Dec. Dig. (Key No.)* §§ 153, 174; *Cent. Dig.* §§ 276, 277, 306.

<sup>7</sup> *Sherwood v. Marwick*, 5 Me. 295; *PIERCE v. JACKSON*, 6 Mass. 242. Compare, also, *Manufacturers' & Mechanics' Bank v. Gore*, 15 Mass. 75, 81, 8 Am. Dec. 83; *Boardman v. Gore*, 15 Mass. 831; *Reynolds v. Waller's Heir*, 1 Wash. (Va.) 164. See "*Partnership*," *Dec. Dig. (Key No.)* §§ 153, 174; *Cent. Dig.* §§ 276, 277, 306.

<sup>8</sup> *Schwabacker v. Riddle*, 84 Ill. 517. See "*Partnership*," *Dec. Dig. (Key No.)* §§ 153, 174; *Cent. Dig.* §§ 276, 277, 306.

sold by such partner to the firm, and afterwards resold by it.<sup>9</sup> So, where one partner illegally seized the plaintiff's cotton, though the other partner took no part in the seizure, both were held liable for punitive damages.<sup>10</sup> So, also, if one partner buys with partnership funds the property of the plaintiff, wrongfully attached while in another's custody as the property of third persons, all the partners are liable for the conversion.<sup>11</sup>

*Misapplication of Money or Property*

With respect to the misapplication or misappropriation of the property of third persons, the important question for determination is whether the partner, when he received the money or property, was acting within the scope of his authority. If it is within the scope of the firm business, or within the authority of a partner to receive the money or property, then all the partners are liable for any misapplication or misappropriation; otherwise not. Thus one member of a firm of attorneys received money from the plaintiff to be invested, and misappropriated it to his private use. In deciding the question of the liability of the innocent co-partner, the court held that, if the money was received to be laid out on a particular mortgage, such a transaction would come within the scope of the business of a firm of lawyers, and all the partners would be liable for the misappropriation; but if received to be laid out generally, that would not be within the scope of the business of lawyers, but of scriveners or loan agents, and hence the innocent partners would not be liable.<sup>12</sup> If, however, it be shown that investing money for others was a part of the business

<sup>9</sup> *Tucker v. Cole*, 54 Wis. 539, 11 N. W. 703. See "*Partnership*," *Dec. Dig.* (Key No.) §§ 153, 174; *Cent. Dig.* §§ 275, 306.

<sup>10</sup> *Robinson v. Goings*, 63 Miss. 500. See "*Partnership*," *Dec. Dig.* (Key No.) §§ 153, 174; *Cent. Dig.* §§ 275, 306.

<sup>11</sup> *Fletcher v. Ingram*, 46 Wis. 191, 50 N. W. 424. See, also, *Gerhardt v. Swaty*, 57 Wis. 24, 14 N. W. 851. See "*Partnership*," *Dec. Dig.* (Key No.) §§ 153, 174; *Cent. Dig.* §§ 275, 306.

<sup>12</sup> *HARMAN v. JOHNSON*, 2 El. & Bl. 61, Gilmore, Cas. Partnership, 399; *Cleather v. Twisden*, 28 Ch. Div. 340; *Rhodes v. Moules*, (1895) 1 Ch. 236. See "*Partnership*," *Dec. Dig.* (Key No.) §§ 153, 174; *Cent. Dig.* §§ 275, 306.

of the firm, then if one partner receives money, and misappropriates it, his copartners are liable.<sup>13</sup> So, if one member of a law firm collects money for a client, and absconds with it, his copartner is liable.<sup>14</sup> Where, however, the act is not within the scope of the firm business, the innocent partners are not liable for any misappropriation. Thus X., of a shipping firm, undertook to collect a draft for A. The draft was made payable to the order of X., who indorsed it to his firm, with the request to collect and put the proceeds to his credit. The firm collected the money, and X. withdrew the money for his own use. His innocent copartners were not held liable.<sup>15</sup> Nor will the mere fact that property obtained by a partner in his individual capacity, and subsequently misappropriated, was for a time in the innocent possession of the firm, render the latter liable for the one partner's tort. The temporary possession of the firm is not the same thing as a receipt of property by the firm in the course of its business.<sup>16</sup> Whether the receipt of the money or property is within the scope of the business

<sup>13</sup> *Willet v. Chambers*, Cowp. 814; *Moore v. Knight* (1891) 1 Ch. 547. See "*Partnership*," *Dec. Dig. (Key No.)* §§ 153, 174; *Cent. Dig.* §§ 275, 306.

<sup>14</sup> *Dwight v. Simon*, 4 La. Ann. 490.

If a partner in a mercantile firm collects money for a third person and uses it in the firm business, instead of remitting it to his principal, the partnership and every member will be liable for the amount. *Welker v. Wallace*, 31 Ga. 362; *Whitaker v. Brown*, 16 Wend. (N. Y.) 505. See "*Attorney and Client*," *Dec. Dig. (Key No.)* § 119; *Cent. Dig.* § 256; "*Partnership*," *Dec. Dig. (Key No.)* §§ 153, 174; *Cent. Dig.* §§ 275, 306.

<sup>15</sup> *Toof v. Duncan*, 45 Miss. 48. See "*Partnership*," *Dec. Dig. (Key No.)* §§ 153, 174; *Cent. Dig.* §§ 275, 306.

<sup>16</sup> *Dounce v. Parsons*, 45 N. Y. 180; *Toof v. Duncan*, 45 Miss. 48; *Bienenstok v. Ammidown*, 155 N. Y. 47, 49 N. E. 321, reversing a. c., 11 Misc. Rep. 76, 29 N. Y. Supp. 593, 32 N. Y. Supp. 1138. See, also, *Marsh v. Keating*, 2 Cl. & F. 250; *Guillon v. Peterson*, 89 Pa. 163.

The principles of the foregoing cases have been embodied into the British Partnership Act of 1890, § 11, providing: "(a) Where a partner, acting within the scope of his apparent authority, receives the money or property of a third person and misapplies it, and (b) where a firm in the course of its business receives money or property of a third person, and the money or property so received is misapplied by one or more of the partners while it is in the custody of

must be determined in the same manner as in other situations involving liability for acts of an agent. It is essentially a question of fact, which in all but clear cases must be decided by the jury.<sup>17</sup>

*Same—Property Wrongfully Obtained by One Partner for His Firm*

It has been held that where one partner obtains money or property by fraud or crime, and turns it over to his firm, or uses it for the benefit of the firm, all the partners are liable to the defrauded person. Thus, where money was obtained by one partner by false pretenses and used for the firm, the innocent partners were held liable for money received to their use.<sup>18</sup> So, also, where a partner wrongfully put into the firm assets, and thereby increased them, the property of a third person, his innocent copartner was held liable.<sup>19</sup>

### SAME—WRONGFUL USE OF TRUST FUNDS

113. One partner cannot make the others responsible for his breach of trust in employing funds of which he alone is trustee in the partnership business, unless such other partners are implicated in the breach of trust by their preknowledge of the source of the fund, or of such facts as should have put them on inquiry as to its source.<sup>20</sup>

the firm, the firm is liable to make good the loss." See "*Partnership*," *Dec. Dig. (Key No.)* §§ 153, 174; *Cent. Dig.* §§ 275, 306.

<sup>17</sup> *Palmer v. Scott*, 68 Ala. 380; *Birckhead v. De Forest*, 120 Fed. 645, 57 C. C. A. 107; *Hefferlin v. Karlman*, 29 Mont. 139, 74 Pac. 201. See "*Partnership*," *Dec. Dig. (Key No.)* § 218; *Cent. Dig.* § 427.

<sup>18</sup> *RAPP v. LATHAM*, 2 B. & Ald. 795. See "*Partnership*," *Dec. Dig. (Key No.)* §§ 153, 174; *Cent. Dig.* §§ 276, 277, 306.

<sup>19</sup> *Durant v. Rogers*, 87 Ill. 508; *Blight's Heirs v. Tobin*, 7 T. B. Mon. (Ky.) 612, 18 Am. Dec. 219; *Wallace v. James*, 5 Grant's Ch. (Up. Can.) 163; *Manufacturers' & Mechanics' Bank v. Gore*, 15 Mass. 75, 8 Am. Dec. 83. See "*Partnership*," *Dec. Dig. (Key No.)* §§ 153, 174; *Cent. Dig.* §§ 274-277, 306.

<sup>20</sup> The English Partnership Act of 1890, § 13, provides: "If a partner, being a trustee, improperly employs trust-property in the business or on the account of the partnership, no other partner is

Presumptively it is not in the ordinary course of the business of a partnership for one partner to apply trust funds to its use. Thus, where one partner obtained his wife's money by forging her name to a check, and used it as his contribution to the capital of the firm, his act was held wholly outside the scope of the partnership business, and his knowledge of the fraud not to be imputable to his copartners.<sup>21</sup> Accordingly the firm must be implicated in the breach of trust, if it is to be made liable. This it cannot be, unless all the members either knew the source of the money, or that it did not belong to the partner who applies it to firm purposes, in which case they are bound to inquire on what terms the money is held.<sup>22</sup> The knowledge of the misconducting partner should not be imputed to the innocent partners. It is only where a partner is acting within the scope of his authority that notice to him is notice to all the partners.<sup>23</sup> Where, however, partners know that a fund belongs to an estate which their copartner represents, they are bound to inquire on what trusts it is held, and knowledge of the powers of the trustee partner is imputed

liable for the trust-property to the persons beneficially interested therein; provided as follows: (1) This section shall not affect any liability incurred by any partner by reason of his having notice of a breach of trust; and (2) nothing in this section shall prevent trust money from being followed and recovered from the firm if still in its possession or under its control."

<sup>21</sup> GILRUTH v. DECELL, 72 Miss. 232, 16 South. 250, Gilmore, Cas. Partnership, 401; Bienenstok v. Ammidown, 155 N. Y. 47, 49 N. E. 321. See "Partnership," Dec. Dig. (Key No.) § 153; Cent. Dig. §§ 274-277.

<sup>22</sup> Dent v. Slough, 40 Ala. 518; Hutchinson v. Smith, 7 Paige (N. Y.) 26; In re Jordan (D. C.) 2 Fed. 319; Rau v. Small, 144 Pa. 304, 22 Atl. 740; Hawley v. Tesch, 88 Wis. 213, 59 N. W. 670; Penn v. Fogler, 182 Ill. 76, 55 N. E. 192; Carter v. Lipsey, 70 Ga. 417. The other partners are not liable, where one partner lends trust money to his firm, unless the fact of its being trust money is known to such other partners. Willett v. Stringer, 17 Abb. Prac. (N. Y.) 152; Englar v. Offutt, 70 Md. 78, 16 Atl. 497, 14 Am. St. Rep. 332; Shaffer v. Martin, 25 App. Div. 501, 49 N. Y. Supp. 853. See "Partnership," Dec. Dig. (Key No.) §§ 153, 174; Cent. Dig. §§ 274-277, 306.

<sup>23</sup> Bienenstok v. Ammidown, 155 N. Y. 47, 49 N. E. 321. See ante, § 104, p. 318. See "Partnership," Dec. Dig. (Key No.) § 159; Cent. Dig. §§ 293-295.

to them, whether they had actual knowledge or not.<sup>24</sup> The mere fact that the firm has been benefited by the money in question does not render it liable to the cestui que trust.<sup>25</sup> However this doctrine will not prevent the cestui from following his own money in the hands of the firm, if he can show that the firm still has it intact, and that it did not come by it by purchase for value without notice of its trust character.<sup>26</sup> Such an action is quite different from that wherein a cestui que trust sues all the partners who are implicated in a breach of trust, either as his debtors or as constructive trustees of the fund.<sup>27</sup>

## POWERS OF PARTNERS AFTER DISSOLUTION

114. Upon dissolution of a partnership by act of the parties, and notice thereof duly given, or by operation of law, without notice, the mutual agency incident to the relation ceases. Each partner, however, even after dissolution, has implied authority to bind his copartners and the firm property by such acts as are reasonably necessary to wind up the partnership affairs, or to complete transactions begun, but unfinished, at the time of dissolution.

Upon the dissolution of the relation of partnership, the mutual agency incident thereto ceases. As between themselves, the partners no longer have any power to bind one another in the same general way as when the firm was a going concern. But, as in the law of agency, an agent's

<sup>24</sup> *Davis v. Gelhaus*, 44 Ohio St. 69, 4 N. E. 593. See "Partnership," *Dec. Dig. (Key No.)* § 159; *Cent. Dig.* §§ 293-295.

<sup>25</sup> *Ex parte Apsey*, 8 Brown, Ch. 265; *Ex parte Heaton*, Buck. 386. See "Partnership," *Dec. Dig. (Key No.)* §§ 153, 174; *Cent. Dig.* §§ 274-277, 306.

<sup>26</sup> *Hollenbaek v. Moore*, 44 N. Y. Super Ct. 107. See, also, *U. S. v. Cohn* (C. C.) 128 Fed. 615. See "Partnership," *Dec. Dig. (Key No.)* §§ 153, 174, 175; *Cent. Dig.* §§ 274-277, 306, 307.

<sup>27</sup> *Emerson v. Durand*, 64 Wis. 111, 116, 24 N. W. 129, 54 Am. Rep. 593; *Stoddard v. Smith*, 11 Ohio St. 581. See "Partnership," *Dec. Dig. (Key No.)* §§ 153, 174; *Cent. Dig.* §§ 274-277, 306.

power may continue for some time after his employment has actually ceased, so, also, in partnership, the mutual agency may continue, after the actual termination of the partnership, unless such termination be by operation of law, as by death. As pointed out elsewhere, in the case of ostensible partners, the mutual agency continues, so far as third parties are concerned, until due notice of the dissolution has been given.<sup>28</sup>

While upon dissolution by act of the parties, with proper notice, or by operation of law, the general agency ceases, it is obvious that some power must still remain in the partners to wind up the partnership affairs. There is a mutual agency, therefore, after dissolution, as well as before; but it is of a different sort and exists for a different purpose. Its chief end is the closing up of the firm business, and its scope extends no further than to such acts as reasonably tend towards the accomplishment of this end.<sup>29</sup>

#### *Liquidating Partners*

Upon the dissolution of a partnership, whether by death or otherwise, all the surviving former members have an

<sup>28</sup> See chapter X, § 196, p. 568, and chapter IV, § 83, p. 265. *Bristol v. Sprague*, 8 Wend. (N. Y.) 423. "The principle upon which this responsibility proceeds is the negligence of the partners in leaving the world in ignorance of the fact of the dissolution, and leaving strangers to conclude that the partnership continues, and to bestow faith and confidence on the partnership name in consequence of that belief." Collyer, *Partn.* (3d Ed.) 505; *Lovejoy v. Spafford*, 93 U. S. 430, 23 L. Ed. 851; *Smart et al. v. Breckenbridge Bank* (Ky., 1906) 90 S. W. 5, 4 L. R. A. (N. S.) 800, and note. See "*Partnership*," *Dec. Dig.* (Key No.) §§ 289-292; *Cent. Dig.* §§ 651-661.

<sup>29</sup> The dissolution of a partnership does not destroy the authority of a partner to act for his former associates in matters in which they still have a common interest and are under a common liability. *GATES v. BEECHER*, 60 N. Y. 518, 19 Am. Rep. 207. After dissolution the agency of a partner exists for winding up the firm business, collecting credits, and paying off debts. *Thursby v. Lidgerwood*, 69 N. Y. 198; *Lange v. Kennedy*, 20 Wis. 279; *Bryant v. Lord*, 19 Minn. 396 (Gil. 342); *Hayden v. Cretcher*, 75 Ind. 108; *Hawn v. Water Co.*, 74 Cal. 418, 16 Pac. 196; *Conrad v. Buck*, 21 W. Va. 396, 413; *Stebbins v. Willard*, 53 Vt. 665.

The majority of the partners exercise the same controlling influence after the dissolution of a partnership as before. *Western*

equal right to the possession of the firm assets for the purpose of winding up the firm affairs.<sup>30</sup> It often happens, however, that the partners will delegate to one of their number the exclusive authority to liquidate the business. Such a delegation gives no additional powers to those usually implied, unless additional powers are expressly granted.<sup>31</sup> The only effect of the appointment of a liquidating partner is to compel third persons, who have notice of it, to deal with him alone, unless they would be subject to the equities of the other partners.<sup>32</sup> In the absence of such notice, third persons have a right to assume that all the former partners have authority to do such acts as are necessary or proper to the winding up of the partnership business.<sup>33</sup>

What powers in particular are included in the agency existing after dissolution will be considered in the ensuing sections.

*Stage Co. v. Walker*, 2 Iowa, 504, 65 Am. Dec. 789. See "*Partnership*," *Dec. Dig. (Key No.)* §§ 277-295; *Cent. Dig.* §§ 622-665.

<sup>30</sup> *Lapenta v. Lettiere*, 72 Conn. 377, 44 Atl. 730, 77 Am. St. Rep. 315; *Gray v. Green*, 142 N. Y. 316, 37 N. E. 124, 40 Am. St. Rep. 596; *Geortner v. Trustees of Village of Canajoharie*, 2 Barb. (N. Y.) 625. See "*Partnership*," *Dec. Dig. (Key No.)* §§ 277-295; *Cent. Dig.* §§ 622-665.

<sup>31</sup> But in Pennsylvania it is held that a liquidating partner has power to borrow money on the credit of the late firm, for the purpose of paying its debts. *Earon v. Mackey*, 106 Pa. 452; *McCowin v. Cubbison*, 72 Pa. 358. See, also, *McCoon v. Galbraith*, 29 Pa. 293; *Meyran v. Abel*, 189 Pa. 215, 42 Atl. 122, 69 Am. St. Rep. 806. See "*Partnership*," *Dec. Dig. (Key No.)* §§ 277-295; *Cent. Dig.* §§ 622-665.

<sup>32</sup> *Gillilan v. Sun Mut. Ins. Co.*, 41 N. Y. 376; *Clark v. Reed*, 31 Leg. Int. (Pa.) 413. See "*Partnership*," *Dec. Dig. (Key No.)* §§ 277-295; *Cent. Dig.* §§ 622-665.

<sup>33</sup> *Hilton v. Vanderbilt*, 82 N. Y. 591; *PALMER v. DODGE*, 4 Ohio St. 21, 62 Am. Dec. 271, *Gilmore, Cas. Partnership*, 405; *Gilmore v. Ham*, 142 N. Y. 1, 36 N. E. 828, 40 Am. St. Rep. 554. See "*Partnership*," *Dec. Dig. (Key No.)* §§ 277-295; *Cent. Dig.* §§ 622-665.

**SAME — PARTICULAR POWERS CONSIDERED —  
POWER TO DISPOSE OF FIRM ASSETS**

115. After dissolution, in the absence of agreement to the contrary, each partner has implied authority to dispose of the partnership property, by sale or any other mode reasonably necessary for the purpose of winding up the firm business.

*Power to Sell*

The equal right of each partner, after dissolution, to the possession of the firm assets, would be valueless without the accompanying right of disposing of those assets in discharge of the firm liabilities, or in settling up the firm business generally.<sup>84</sup> In the absence of agreement to the contrary, it is accordingly recognized that each partner may sell the partnership assets for the purposes above indicated. Thus a sale by one partner, after dissolution, of a judgment in favor of his firm, conveys a perfectly good title.<sup>85</sup> Real estate being considered personalty for the purpose of paying firm debts, it, too, may be sold in order to discharge the firm liabilities and settle the partnership accounts.<sup>86</sup> But the exercise of the power is subject to the same limitations as have been determined in a previous part of this chapter.<sup>87</sup> Since the good will of a partnership is part of its property, it follows that it, too, can be sold.<sup>88</sup> Certain

<sup>84</sup> *Lapenta v. Lettlere*, 72 Conn. 377, 44 Atl. 730, 77 Am. St. Rep. 315; *Bach v. State Ins. Co.*, 64 Iowa, 595, 21 N. W. 99; *Gray v. Green*, 142 N. Y. 316, 37 N. E. 124, 40 Am. St. Rep. 596. See "*Partnership*," *Dec. Dig. (Key No.)* § 282; *Cent. Dig.* §§ 638-641.

<sup>85</sup> *Robbins v. Fuller*, 24 N. Y. 570. See, also, *Needham v. Wright*, 140 Ind. 190, 39 N. E. 510. See "*Partnership*," *Dec. Dig. (Key No.)* § 282; *Cent. Dig.* §§ 638-641.

<sup>86</sup> *Roulston v. Washington*, 79 Ala. 529; *Walling v. Burgess*, 122 Ind. 299, 22 N. E. 419, 23 N. E. 1076, 7 L. R. A. 481; *Barton v. Lovejoy*, 56 Minn. 380, 57 N. W. 935, 45 Am. St. Rep. 482; *SHANKS v. KLEIN*, 104 U. S. 18, 26 L. Ed. 635, *Gilmore, Cas. Partnership*, 269. See "*Partnership*," *Dec. Dig. (Key No.)* § 282; *Cent. Dig.* §§ 638-641.

<sup>87</sup> See ante, §§ 94-96, 101, pp. 288-296, 308.

<sup>88</sup> *Dayton v. Wilkes*, 17 How. Prac. (N. Y.) 510; *Holden's Adm'rs v. McMakin*, 1 Pars. Eq. Cas. (Pa.) 270; *Snyder Mfg. Co. v. Snyder*,

cases, however, relying on the now abandoned conception of partnership as a tenancy in common,<sup>39</sup> have intimated that the power to sell partnership assets should cease with the necessity for it; in other words, that as soon as the firm debts are paid the power to sell the firm assets comes to an end.<sup>40</sup> Obviously this overlooks the fact that a partner's functions, after dissolution, are something more than the mere paying of debts. If the property is more than sufficient to pay firm debts, it remains to be divided among the former members of the firm, and very often it cannot be divided unless it is first sold.

*Same—Power to Pledge*

That a surviving partner has power to pledge firm property in the course of winding up the firm business is well settled.<sup>41</sup> There is some authority for the view that in case of a dissolution inter vivos each partner has such power.<sup>42</sup> But it has been denied.<sup>43</sup>

*Same—Assignment for Benefit of Creditors*

After dissolution inter vivos there is no implied power in the partners to make an assignment for the benefit of creditors, nor to confess judgment against the firm.<sup>44</sup>

54 Ohio St. 86, 43 N. E. 325, 31 L. R. A. 657. See "*Partnership*," *Dec. Dig. (Key No.)* § 310; *Cent. Dig.* § 712.

<sup>39</sup> See ante, chapter III, §§ 52, 55, 56, 62, pp. 146, 170, 176, 195, "Title to Partnership Property."

<sup>40</sup> *Hogendobler v. Lyon*, 12 Kan. 276. See, also, *Stair v. Richardson*, 108 Ind. 429, 9 N. E. 300; *Halstead v. Shepard*, 23 Ala. 558; *Bank of Port Gibson v. Baugh*, 9 Smedes & M. 290; *Roots v. Mason City Salt & Mining Co.*, 27 W. Va. 483, at page 492. See "*Partnership*," *Dec. Dig. (Key No.)* § 282; *Cent. Dig.* §§ 638-641.

<sup>41</sup> *Bohler v. Tappan* (D. C.) 1 Fed. 469; *First National Bank of Peru v. Parsons*, 128 Ind. 147, 27 N. E. 486; *Durant v. Pierson*, 124 N. Y. 444, 26 N. E. 1095, 12 L. R. A. 146, 21 Am. St. Rep. 686; *Burchinell v. Koon*, 25 Colo. 59, 52 Pac. 1100. See "*Partnership*," *Dec. Dig. (Key No.)* § 282; *Cent. Dig.* §§ 638-641.

<sup>42</sup> *Müller v. Florer*, 15 Ohio St. 148. See "*Partnership*," *Dec. Dig. (Key No.)* § 282; *Cent. Dig.* §§ 638-641.

<sup>43</sup> *Roots v. Mason City Salt & Mining Co.*, 27 W. Va. 483. See "*Partnership*," *Dec. Dig. (Key No.)* § 282; *Cent. Dig.* §§ 638-641.

<sup>44</sup> *Paton v. Wright*, 15 How. Prac. (N. Y.) 481; *Egberts v. Wood*, 3 Paige (N. Y.) 517, 24 Am. Dec. 236; *Deckert v. Filbert*, 3 Watts & S. (Pa.) 454; *Kellogg v. Cayce*, 84 Tex. 213, 19 S. W. 388; *Mair v.*

### SAME—POWER TO COLLECT DEBTS

116. After dissolution each partner has implied power to collect and settle claims, receive payments, and grant discharges from debts owed the firm.

If a partner is to wind up the firm business after its dissolution, he must obviously have the same power to collect outstanding obligations as he had during the continuance of the partnership.<sup>45</sup> Firm debtors, paying a partner after dissolution who is notoriously insolvent, will be protected, even though notified by the other partners not to pay him.<sup>46</sup> So, also, payment to a retiring partner, with notice that he has retired, is good.<sup>47</sup> But the other partners are not bound, if a debtor, knowing that a receiver has been appointed, nevertheless pays one of the former members of the firm.<sup>48</sup> The power to collect debts, of course, carries with it power to receipt for them, and to grant discharges on payment.<sup>49</sup>

Beck (Pa.) 2 Atl. 218. Compare ante, §§ 97, 103, 122, pp. 297, 316, 353. See *Partnership*, "Dec. Dig. (Key No.) § 282; Cent. Dig. §§ 638-641.

<sup>45</sup> *Heartt v. Walsh*, 75 Ill. 200; *De Mott v. Kendrick*, 65 Hun, 623, 20 N. Y. Supp. 195; *Robbins v. Fuller*, 24 N. Y. 570; *Granger v. McGilvra*, 24 Ill. 152; *Gillilan v. Sun Mut. Ins. Co.*, 41 N. Y. 376. That a partner has no authority to accept anything but money in payment of a firm debt, see *Kutz v. Naugle*, 7 Pa. Super. Ct. 179; *Kirk v. Hiatt*, 2 Ind. 322. See "*Partnership*," Dec. Dig. (Key No.) § 283; Cent. Dig. §§ 642, 643.

<sup>46</sup> *Gillilan v. Sun Mutual Ins. Co.*, 41 N. Y. 376; *MAJOR v. HAWKES*, 12 Ill. 298, *Gilmore, Cas. Partnership*, 403; *Heartt v. Walsh*, 75 Ill. 200. See "*Partnership*," Dec. Dig. (Key No.) § 283; Cent. Dig. §§ 642, 643.

<sup>47</sup> *Fettrecht v. Armstrong*, 5 Rob. (N. Y.) 339. See "*Partnership*," Dec. Dig. (Key No.) § 283; Cent. Dig. §§ 642, 643, 655.

<sup>48</sup> *Manning v. Brickell*, 3 N. C. 133. Nor will the debtor be protected, if, having notice that his debt has been made the property of one of the partners by assignment, he nevertheless pays another. *Hilton v. Vanderbilt*, 82 N. Y. 591; *Bank of Montreal v. Page*, 98 Ill. 109; *Gillilan v. Sun Mut. Ins. Co.*, 41 N. Y. 376, 380. Contra: *Hansen v. Miller*, 44 Ill. App. 550. See "*Partnership*," Dec. Dig. (Key No.) § 283; Cent. Dig. §§ 642, 643.

<sup>49</sup> *Gordon v. Albert*, 168 Mass. 150, 46 N. E. 423; *Riddle v. Et-*

### SAME—POWER TO PAY AND SETTLE FIRM DEBTS

#### 117. Each partner has power to pay and settle firm liabilities.

The application of partnership property to firm debts, and the right and duty of the partners so to apply it, are the subject of other sections.<sup>50</sup> It is also necessary here to state that the power of each partner after dissolution to pay firm debts follows from the equitable right of each partner to insist upon the application of the partnership funds to partnership debts, and that the existence of the power has never been seriously doubted.<sup>51</sup> Without it practically every step in the winding up of a partnership would have to be taken in the courts. A partner may compromise firm debts and make bona fide settlements.<sup>52</sup> He may pay not only in cash, but by transferring firm property. The payment of rent due under a pre-existing lease is a mere payment of a firm debt, and not a new obligation.<sup>53</sup>

ting, 32 Pa. 412; *Van Keuren v. Parmelee*, 2 N. Y. 523, 51 Am. Dec. 322; *Geortner v. Trustees of Village of Canajoharie*, 2 Barb. (N. Y.) 625. See "*Partnership*," *Dec. Dig. (Key No.)* § 283; *Cent. Dig.* §§ 642, 643.

<sup>50</sup> Ante, chapter III, §§ 58-62, pp. 179-195; post, chapter VI, § 137, p. 400.

<sup>51</sup> *MAJOR v. HAWKES*, 12 Ill. 298, Gilmore, Cas. Partnership, 403; *Gard v. Clark*, 29 Iowa, 189; *Knowlton v. Reed*, 38 Me. 246; *Hall v. Clagett*, 48 Md. 223. See "*Partnership*," *Dec. Dig. (Key No.)* § 283; *Cent. Dig.* § 644.

<sup>52</sup> *Curry v. Kurtz*, 33 Miss. 24; *Milliken v. Loring*, 37 Me. 408; *Bass v. Taylor*, 34 Miss. 342; *Union Bank v. Hall*, Harp. (S. C.) 245. See "*Partnership*," *Dec. Dig. (Key No.)* § 287; *Cent. Dig.* § 633.

<sup>53</sup> *Milliken v. Loring*, 37 Me. 408; *Barnes v. Northern Trust Co.*, 169 Ill. 112, 48 N. E. 31. See "*Partnership*," *Dec. Dig. (Key No.)* §§ 282, 283, 285; *Cent. Dig.* §§ 638-645.

### SAME—POWER TO PERFORM EXISTING CONTRACTS

118. After dissolution each partner has authority to complete transactions begun, but not finished, at the time of dissolution, and even to incur new obligations necessarily incidental to the performance of such existing obligations.

That the mere dissolution of a partnership should not relieve its members of the duty of performing its unfulfilled contracts is obvious. Whatever a partner, as survivor or liquidator, does that is reasonably necessary to the completion of the firm's existing obligations is within the scope of his authority.<sup>54</sup> Thus if, at the time of dissolution, a firm was under obligation to execute a guaranty, and one partner executes it, he binds all the former partners.<sup>55</sup> Similarly third persons may hold the partners by completing contracts made with the firm before dissolution, as by delivering goods that were ordered during the continuance of the partnership to one of the partners after dissolution.<sup>56</sup> A partner has no authority after dissolution, however, to complete a contract that was a personal one, in reliance

<sup>54</sup> *Denver v. Roane*, 99 U. S. 555, 25 L. Ed. 476; *Little v. Caldwell*, 101 Cal. 553, 36 Pac. 107, 40 Am. St. Rep. 89; *King v. Leighton*, 100 N. Y. 386, 3 N. E. 594; *GATES v. BEECHER*, 60 N. Y. 518, 19 Am. Rep. 207. See "*Partnership*," *Dec. Dig. (Key No.)* § 284; *Cent. Dig.* § 629.

<sup>55</sup> *Star Wagon Co. v. Swezy*, 59 Iowa, 609, 13 N. W. 749. On duty of surviving law partner to carry on pending litigation for estate of deceased partner, see *Sterne v. Goep*, 20 Hun (N. Y.) 396; *Moses v. Bagley*, 55 Ga. 283. See "*Partnership*," *Dec. Dig. (Key No.)* § 284; *Cent. Dig.* § 629.

<sup>56</sup> *WHITING et al. v. FARRAND et al.*, 1 Conn. 60, *Gilmore, Cas. Partnership*, 404; *Kenney v. Altvater*, 77 Pa. 34; *Hubbard v. Matthews*, 54 N. Y. 43, 51, 13 Am. Rep. 562; *Cady v. Shepherd*, 11 Pick. (Mass.) 400, 22 Am. Dec. 379. But a mere offer to sell, unaccepted before the death of a partner, cannot afterwards by acceptance become a contract. *GOODSPEED v. WIARD PLOW CO.*, 45 Mich. 322, 7 N. W. 902, *Gilmore, Cas. Partnership*, 404. See "*Partnership*," *Dec. Dig. (Key No.)* § 284; *Cent. Dig.* § 629.

upon a particular partner, such as a contract between an author and a publishing firm,<sup>57</sup> nor a general contract to do all work of a certain kind. These are both terminated by the dissolution of the partnership.<sup>58</sup> It is often impossible to complete the firm contracts without incurring some new obligations; if these are necessary to that end, they will be treated as merely incidental, and therefore within the implied authority of the partner.<sup>59</sup> Thus, although a partner ordinarily has no authority after dissolution to make or renew negotiable paper, where a firm had, before dissolution, agreed to renew certain notes, it was held that any partner might do so in pursuance of the firm agreement.<sup>60</sup>

### SAME—POWER TO INCUR NEW OBLIGATIONS

#### 119. After dissolution the partners have no power to bind each other upon any new contracts.

As the authority of a partner, after dissolution, is restricted to the settlement of the partnership affairs, it follows that dissolution revokes the power of the partners to bind each other by new contracts.<sup>61</sup> This is clearly shown

<sup>57</sup> *Stevens v. Benning*, 1 K. & J. 168, 6 De G., M. & G. 223. See "Partnership," *Dec. Dig. (Key No.)* §§ 279, 284; *Cent. Dig.* §§ 629, 637.

<sup>58</sup> *Caldwell v. Stileman*, 1 Rawle (Pa.) 212; *Robb v. Mudge*, 14 Gray (Mass.) 534; *Schlater v. Winpenny*, 75 Pa. 321. But dissolution does not terminate a contract for a specified length of time. *Oakford v. European & Am. Shipping Co.*, 1 H. & M. 182, 191. See, also, *Horst v. Roehm* (O. C.) 84 Fed. 565. See "Partnership," *Dec. Dig. (Key No.)* §§ 279, 284; *Cent. Dig.* §§ 629, 637.

<sup>59</sup> *BUTCHART v. DRESSER*, 10 Hare, 453, 4 De G., M. & G. 542. See "Partnership," *Dec. Dig. (Key No.)* §§ 285, 286; *Cent. Dig.* §§ 645-650.

<sup>60</sup> *RICHARDSON v. MOIES*, 31 Mo. 430. But the liquidating partner cannot bind the others by indorsing a new draft and substituting it for any old one, and a creditor taking such a draft with knowledge of the facts cannot hold the other partners upon it. *First Nat. Bank of Macon v. Ells*, 68 Ga. 192. See "Partnership," *Dec. Dig. (Key No.)* § 286; *Cent. Dig.* §§ 647, 648.

<sup>61</sup> *Bell v. Morrison*, 1 Pet. 351, 7 L. Ed. 174; *Clay v. Field* (D.

in the denial of the power to borrow, so as to bind the firm, even to pay firm debts.<sup>83</sup> Were it allowed, the settlement of the firm affairs might be indefinitely postponed.

*Power to Give or Indorse Negotiable Paper*

As a partner cannot, after dissolution, create new obligations, or vary the nature or obligation of those already existing, it follows that he cannot, after dissolution, bind his copartners by making, accepting, indorsing, or renewing negotiable paper.<sup>84</sup> The mere fact that the proceeds of the paper are applied to the payment of firm debts makes no difference.<sup>85</sup> Here, again, to imply such a power would indefinitely postpone the settlement of the partnership affairs. As with all other powers not ordinarily implied, however, previous special authorization<sup>86</sup> or subsequent ratification will supply the lack of authority.<sup>87</sup>

C.) 84 Fed. 375; *Weld v. Johnson Mfg. Co.*, 86 Wis. 562, 57 N. W. 374; *Perrin v. Keene*, 19 Me. 355, 36 Am. Dec. 759; *Speake v. White*, 14 Tex. 364; *Hicks v. Russell*, 72 Ill. 230; *Bennett v. Buchan*, 61 N. Y. 222. But each partner is liable for all expenses reasonably necessary in winding up the firm business. *Conrad v. Buck*, 21 W. Va. 396; *Stebbins v. Willard*, 53 Vt. 665. See "*Partnership*," *Dec. Dig. (Key No.)* §§ 285, 286; *Cent. Dig.* §§ 645-650.

<sup>82</sup> *Hayden v. Cretcher*, 75 Ind. 108; *Dowzelot v. Rawlings*, 58 Mo. 75; *Payne v. Gardiner*, 29 N. Y. 146; *Lee v. Stowe*, 57 Tex. 444. See "*Partnership*," *Dec. Dig. (Key No.)* §§ 285, 286; *Cent. Dig.* §§ 645-650.

<sup>83</sup> *Lockwood v. Comstock*, 4 McLean, 383, 15 Fed. Cas. No. 8,449; *Funck v. Heintze* (Tex. Civ. App.) 23 S. W. 417; *Lange v. Kennedy*, 20 Wis. 279; *Bank of Montreal v. Page*, 98 Ill. 109. See "*Partnership*," *Dec. Dig. (Key No.)* § 286; *Cent. Dig.* §§ 646-649.

<sup>84</sup> *Falls v. Hawthorn*, 80 Ind. 444; *Hayden v. Cretcher*, 75 Ind. 108; *Parham Sewing Machine Company v. Brock*, 113 Mass. 194. Such a note will not extinguish a firm debt. *Gardner v. Conn*, 34 Ohio St. 187. But that notes given in liquidation of partnership liability constitute no new obligation, see *Chappell v. Allen*, 38 Mo. 213; *McPherson v. Rathbone*, 11 Wend. (N. Y.) 96; *Ward v. Tyler*, 52 Pa. 393. See "*Partnership*," *Dec. Dig. (Key No.)* § 286; *Cent. Dig.* §§ 246-249.

<sup>85</sup> *Wilson v. Forder*, 20 Ohio St. 95, 5 Am. Rep. 627; *New Haven County Bank v. Mitchell*, 15 Conn. 222. But general authority to a partner after dissolution to close up the partnership indebtedness by executing notes in the firm name does not authorize him to bind

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<sup>86</sup> See note 66 on following page.

*Same—Indorsement Without Recourse*

An exception to the general rule is recognized by the weight of authority in the case of indorsements without recourse of paper payable to the firm. To be sure, an ordinary indorsement is a new contract, and therefore impliedly forbidden to a partner after dissolution. But as a partner has implied power to sell firm property, of which the firm's choses in action are a part, there would seem to be no valid reason for denying validity to such a sale. The implied warranty of genuineness which an indorsement without recourse involves should be no more beyond the scope of a partner's power after dissolution than the implied warranty of title in transfers of the firm's other assets.<sup>67</sup>

**SAME—POWER TO MAKE ADMISSIONS**

120. After dissolution a partner has power to bind his former copartners by only those admissions fairly relating to the settlement of the partnership affairs. Whether he can by admissions bind his copartners as to transactions occurring during the continuance of the partnership is a question on which the authorities are conflicting.

his late copartner by stipulating in such notes to pay attorney's fees and to waive exemptions. *Brown v. Bamberger*, 110 Ala. 342, 20 South. 114. Though paper is signed before dissolution, a partner has no authority to issue it after. *Gale v. Miller*, 54 N. Y. 536, affirming 1 Lans. (N. Y.) 451, and 44 Barb. (N. Y.) 420; *Robb v. Mudge*, 14 Gray (Mass.) 534; *Woodford v. Dorwin*, 3 Vt. 82, 21 Am. Dec. 573. See, also, *Glasscock v. Smith*, 25 Ala. 474. See "*Partnership*," *Dec. Dig. (Key No.)* §§ 285, 286; *Cent. Dig.* §§ 645-650.

<sup>66</sup> *Sanborn v. Stark* (C. C.) 31 Fed. 18; *Whitworth v. Ballard*, 56 Ind. 279; *Carter v. Pomeroy*, 30 Ind. 438. The ratification may be by parol and informal, as by a partner's saying he had no objection to the firm name being used. *Smith v. Winter*, 4 M. & W. 454. See "*Partnership*," *Dec. Dig. (Key No.)* § 286; *Cent. Dig.* § 649.

<sup>67</sup> *Yale v. Eames*, 1 Metc. (Mass.) 486; *Waite v. Foster*, 33 Me. 424; *Parker v. Macomber*, 18 Pick. (Mass.) 505. Contra, *Fellows v. Wyman*, 33 N. H. 351; *Glasscock v. Smith*, 25 Ala. 474; *Whitworth v. Ballard*, 56 Ind. 279. See "*Partnership*," *Dec. Dig. (Key No.)* § 286; *Cent. Dig.* § 648.

At first glance it would seem that, after dissolution of a partnership, one partner should have no more power to impose an obligation upon his former associates by his acknowledgment or admissions than could an agent, for the relation of mutual agency no longer exists when the firm is dissolved. Such is the view of a long line of cases following the first American decision on the subject.<sup>68</sup> In these jurisdictions, for instance, the admission of a partner after dissolution that a certain partnership note was given, not for his private debt, but for a firm debt, would not be received in evidence.<sup>69</sup>

In the same year that the leading American case denying the authority to bind one's former partners by admissions was decided, however, an English case, with an almost equally long line of followers, recognized such authority.<sup>70</sup> The theory of these cases is that the firm still exists as to things past, and that, as each partner has the power to pay debts after dissolution, there is no reason why he should not have power to say whether a certain debt exists and what is its amount. So long as the admissions concern things which took place during the existence of the copartnership, in the regular course of the business of the firm, and do not create a new liability, one partner may bind the others thereby.<sup>71</sup> Where the admissions in

<sup>68</sup> *Hackley v. Patrick* (1808) 3 Johns. (N. Y.) 536. See, also, *Bispham v. Patterson*, 2 McLean, 87, Fed. Cas. No. 1,441; *Cunningham v. Bragg*, 37 Ala. 436; *Dowzelot v. Rawlings*, 58 Mo. 75; *Nichols v. White*, 85 N. Y. 531; *Tassey v. Church*, 4 Watts & S. (Pa.) 141, 39 Am. Dec. 65. See, also, collection of cases in *Gilmore v. Ham*, 40 Am. St. Rep. 567. See "*Partnership*," *Dec. Dig. (Key No.)* § 294; *Cent. Dig.* § 630; "*Evidence*," *Dec. Dig. (Key No.)* § 249; *Cent. Dig.* §§ 965-975.

<sup>69</sup> *Curry v. White*, 51 Cal. 530; *Brewster v. Hardeman*, Dud. (Ga.) 138; *MILLER v. NEIMERIOK*, 19 Ill. 172, *Gilmore, Cas. Partnership*, 412. See "*Partnership*," *Dec. Dig. (Key No.)* § 294; *Cent. Dig.* § 630; "*Evidence*," *Dec. Dig. (Key No.)* § 249; *Cent. Dig.* §§ 965-975.

<sup>70</sup> *WOOD v. BRADDICK* (1808) 1 Taunt. 104, *Gilmore, Cas. Partnership*, 411. See "*Partnership*," *Dec. Dig. (Key No.)* § 294; *Cent. Dig.* § 630; "*Evidence*," *Dec. Dig. (Key No.)* § 249; *Cent. Dig.* §§ 965-975.

<sup>71</sup> *Cochran v. Cunningham's Ex'r*, 16 Ala. 448, 50 Am. Dec. 186; *Cady v. Shepherd*, 11 Pick. (Mass.) 400, 22 Am. Dec. 379; *Nalle v.*

question relate merely to the winding up of the partnership affairs, and the power of the partners in so winding up, it is possible to steer a middle course; for probably even the decisions following *Hackley v. Patrick*<sup>72</sup> would find no objection to the liquidating partner's binding his former associates by such admissions.<sup>73</sup>

### SAME—POWER TO TAKE FIRM DEBTS OUT OF THE STATUTE OF LIMITATIONS

121. Although the decisions are conflicting, still by the weight of authority, when due notice of dissolution has been given, a partner cannot, by an acknowledgment of a partnership debt or a promise to pay it, remove the bar of the statute of limitations, so as to bind his copartners.

With respect to the power of partners after dissolution to remove the bar of the statute of limitations on firm debts, there is the same conflict of authority as in the case of admissions. Some of the disagreement is doubtless due to the difference in view as to the effect of the statute. If the running of the statutory period extinguishes the debt, so that a new promise is necessary to restore it, the surviving partner should have no power by an admission thus to create a new obligation. If, however, the old debt still exists, but the remedy merely is barred, an admission does not involve the creation of a new liability. The former would seem to be the general view of the effect of the stat-

*Gates*, 20 Tex. 315; *Loomis v. Loomis*, 26 Vt. 198; *Rich v. Flanders*, 39 N. H. 304. See "*Partnership*," *Dec. Dig. (Key No.)* § 294; *Cent. Dig.* § 630; "*Evidence*," *Dec. Dig. (Key No.)* § 249; *Cent. Dig.* §§ 965-975.

<sup>72</sup> 3 Johns. (N. Y.) 536 (1808), *supra*. See "*Partnership*," *Dec. Dig. (Key No.)* § 294; *Cent. Dig.* § 630; "*Evidence*," *Dec. Dig. (Key No.)* § 249; *Cent. Dig.* §§ 965-975.

<sup>73</sup> *Barnes v. Northern Trust Co.*, 169 Ill. 112, 48 N. E. 31; *Parsons on Part.* (4th Ed.) § 128. See "*Partnership*," *Dec. Dig. (Key No.)* § 294; *Cent. Dig.* § 630; "*Evidence*," *Dec. Dig. (Key No.)* § 249; *Cent. Dig.* §§ 965-975.

ute. Where such view prevails as to debts already barred at the time of the admission, the weight of authority is to the effect that a partner has no more power to revive an extinct debt, so as to render his former associates liable, than he has to involve them in a new one after dissolution.<sup>74</sup> On the other hand, there are a few cases which proceed on the theory that the agency of partners, even after dissolution, enables them to stop the running of the statute as against their associates.<sup>75</sup>

With respect to acknowledgments after dissolution, but before the statute of limitations has taken effect, there is even greater diversity of opinion. On the ground that it is absurd to regard a part payment by one partner after dissolution as a promise by him and his former associates to pay the rest, the weight of authority denies the right to prolong the statutory time for enforcing claims.<sup>76</sup> By the minority it is urged that the agency of the partners for the purpose of winding up includes power to make payments which are for the benefit of all, and therefore to prolong the time limit of the statute of limitations by such payments.<sup>77</sup> Where no notice of dissolution has been given, it

<sup>74</sup> *MAYBERRY v. WILLOUGHBY*, 5 Neb. 368, 25 Am. Rep. 491, Gilmore, Cas. Partnership, 413; *Lang's Heirs v. Waring*, 17 Ala. 145; *Newman v. McComas*, 43 Md. 70; *Van Keuren v. Parmelee*, 2 N. Y. 523, 51 Am. Dec. 322; *Bell v. Morrison*, 1 Pet. 351, 375, 7 L. Ed. 174; *Kerper v. Wood*, 48 Ohio St. 613, 29 N. E. 501, 15 L. R. A. 656; *Reppert v. Colvin*, 48 Pa. 248. Where there is express authority by all the partners, of course, the power exists. *Watson v. Woodman*, L. R. 20 Eq. 721, 730; *Davis v. Poland*, 92 Va. 225, 23 S. E. 292. See "*Limitation of Actions*," *Dec. Dig. (Key No.)* § 143; *Cent. Dig.* § 580; "*Partnership*," *Cent. Dig.* § 634.

<sup>75</sup> *Whitcomb v. Whiting*, 2 Doug. 652; *Day v. Merritt*, 38 N. J. Law, 32, 20 Am. Rep. 362; *Wheelock v. Doolittle*, 18 Vt. 440, 46 Am. Dec. 163, but altered by statute since. See "*Limitation of Actions*," *Dec. Dig. (Key No.)* § 143; *Cent. Dig.* § 580; "*Partnership*," *Cent. Dig.* § 634.

<sup>76</sup> *Tappan v. Kimball*, 30 N. H. 136; *Curry v. White*, 51 Cal. 530; *Tate v. Clements*, 16 Fla. 339, 26 Am. Rep. 709; *Wilson v. Waugh*, 101 Pa. 233; *Haddock v. Crocheron*, 32 Tex. 276, 5 Am. Rep. 244. See "*Limitation of Actions*," *Dec. Dig. (Key No.)* §§ 143, 155; *Cent. Dig.* §§ 580, 626; "*Partnership*," *Cent. Dig.* § 634.

<sup>77</sup> *Whitcomb v. Whiting*, 2 Doug. 652; *Burr v. Williams*, 20 Ark. 171; *Bissell v. Adams*, 35 Conn. 299; *Van Staden v. Kline*, 64 Iowa,

is generally held that creditors receiving a part payment or a new promise from one of the partners should be allowed to rely on it as a protection from the running of the statute.<sup>78</sup>

## POWERS OF SURVIVING PARTNER

122. In case of the death of a partner, the surviving partner or partners have the exclusive right of possession and control of the firm property for the purpose of doing any act necessary or proper for completing existing contracts and winding up the firm business.

### *Powers of Surviving Partner*

How the death of a partner affects partnership property, the nature of the title of the surviving partner as quasi trustee, and his duties towards the representatives of the deceased partner, have been the subjects of an earlier chapter.<sup>79</sup> Also the nature of the partnership liability and the quasi severable character of firm contracts has been discussed.<sup>80</sup> It now remains to notice the scope of the power of the surviving partner with respect to winding up the partnership business. Here, as in the case of dissolution *inter vivos*, the power of the surviving partner exists for the purpose of bringing the affairs of the firm to a close.

180, 20 N. W. 3 (surviving partner); *McClurg v. Howard*, 45 Mo. 365, 100 Am. Dec. 378. See "*Limitation of Actions*," *Dec. Dig.* (Key No.) § 155; *Cent. Dig.* § 626; "*Partnership*," *Cent. Dig.* § 634.

<sup>78</sup> *Forbes v. Garfield*, 32 Hun (N. Y.) 389; *Clement v. Clement*, 69 Wis. 599, 35 N. W. 17, 2 Am. St. Rep. 760; *SAGE v. ENSIGN*, 2 Allen (Mass.) 245; *Gates v. Flisk*, 45 Mich. 522, 528, 8 N. W. 558. But see *Tate v. Clements*, 16 Fla. 339, 26 Am. Rep. 709.

The law of the state where the remedy is sought governs the question as to the power of the partner to relieve from the statute *MAYBERRY v. WILLOUGHBY*, 5 Neb. 368, 25 Am. Rep. 491, *Gilmore, Cas. Partnership*, 413. See "*Limitation of Actions*," *Dec. Dig.* (Key No.) §§ 143, 155; *Cent. Dig.* §§ 580, 626; "*Partnership*," *Cent. Dig.* § 634.

<sup>79</sup> Ante, chapter III, §§ 65-67, pp. 204-214.

<sup>80</sup> See chapter IV, §§ 69-73, pp. 217-233.

Strictly speaking, the surviving partner is not an agent at all. He acts in his own right, and while he is answerable to the representatives of the deceased partner for his administration of the firm business he does not represent them. He takes the legal title to the personal property and the choses in action and an equitable title to the real estate. He stands in the place of the partnership with respect to its assets and liabilities, and is vested with full power, possession, and management of the firm business.<sup>81</sup> His function as such quasi trustee is to collect all the firm assets, to apply them to the firm debts, and to distribute the surplus, if any, among the surviving partners and the representatives of those who are dead.<sup>82</sup> He has no right to continue the partnership business longer than is necessary for winding up the affairs,<sup>83</sup> except where the deceased partner by will authorized the business to be carried on for a limited period.<sup>84</sup> If he does continue the business without authority, he only is liable for the debts thus incurred,<sup>85</sup> and is answerable to the representatives of the deceased partner for all losses caused by such continuance.<sup>86</sup> Whatever he does in winding up the firm business, therefore, may be considered within the fair scope of the purpose of the trust,

<sup>81</sup> *Murray v. Fox*, 39 Hun (N. Y.) 110; *NEHRBOSS v. BLISS*, 88 N. Y. 600. See "Partnership," *Dec. Dig. (Key No.)* §§ 243-258; *Cent. Dig.* §§ 509-598.

<sup>82</sup> *Patton v. Leftwich*, 86 Va. 421, 10 S. E. 686, 6 L. R. A. 569, 19 Am. St. Rep. 902. See "Partnership," *Dec. Dig. (Key No.)* § 245; *Cent. Dig.* §§ 514-518.

<sup>83</sup> *Clay v. Field* (D. C.) 84 Fed. 375; *Nelson v. Hayner*, 66 Ill. 487; *Clay v. Freeman*, 118 U. S. 97, 6 Sup. Ct. 964, 30 L. Ed. 104; *Grim's Appeal*, 105 Pa. 375. See "Partnership," *Dec. Dig. (Key No.)* § 255; *Cent. Dig.* §§ 552-561.

<sup>84</sup> *Stewart v. Robinson*, 115 N. Y. 323, 22 N. E. 160, 163, 5 L. R. A. 410.

See chapters II, § 22, p. 73; III, § 68, p. 215; X, § 199, p. 573, for discussion of provision for the continuation of the business after death of a partner. See "Partnership," *Dec. Dig. (Key No.)* § 255; *Cent. Dig.* §§ 552-561.

<sup>85</sup> *Julland v. Watson*, 43 N. Y. 571. See "Partnership," *Dec. Dig. (Key No.)* § 255; *Cent. Dig.* §§ 552-561.

<sup>86</sup> *Roberts v. Hendrickson*, 75 Mo. App. 484. See "Partnership," *Dec. Dig. (Key No.)* § 255; *Cent. Dig.* §§ 552-561.

and of his authority.<sup>87</sup> So far as third persons are concerned, who have dealt with or might deal with the partnership as such, the right of a surviving partner to take all the property of the firm for the purpose of reducing it to money and paying the firm debts is a right incidental to all partnerships, and one of which he cannot be deprived by the personal representatives of the deceased partner, in the absence of any allegation of mismanagement or want of capacity.<sup>88</sup> If there be more than one surviving partner, the right and duty to wind up the firm business devolves equally upon them all.<sup>89</sup> But the privilege of participating in the winding up is personal, and may be waived or resigned to the other partners or their representatives.<sup>90</sup> The right and duty survives, so that, if there be several surviving partners and one dies, the remaining survivors succeed to the work. Upon the death of the last survivor, his administrator is chargeable with the duty of completing the settlement.<sup>91</sup>

<sup>87</sup> *Offutt v. Scott*, 47 Ala. 104. See "Partnership," *Dec. Dig. (Key No.)* §§ 243-257; *Cent. Dig.* §§ 509-563.

<sup>88</sup> *Shearer v. Paine*, 12 Allen (Mass.) 289; *Rice v. Merchants' & Planters' Nat. Bank of Montgomery*, 100 Ala. 617, 13 South. 659. The surviving partner has the sole power of settling the partnership affairs, and only when a case of plain delinquency is shown on his part can the representatives of the deceased invoke the aid of a court of equity to compel him to act for the good of all interested parties. *Miller v. Jones*, 39 Ill. 54; *Merritt v. Dickey*, 38 Mich. 41; *Nelson v. Hayner*, 66 Ill. 487; *Shields v. Fuller*, 4 Wls. 102, 105, 65 Am. Dec. 293. See, also, *BUSH v. CLARK*, 127 Mass. 111. See "Partnership," *Dec. Dig. (Key No.)* §§ 243-246; *Cent. Dig.* §§ 509-523.

<sup>89</sup> *Davis v. Sowell*, 77 Ala. 262; *Heartt v. Walsh*, 75 Ill. 200. See "Partnership," *Dec. Dig. (Key No.)* § 245; *Cent. Dig.* §§ 514-518.

<sup>90</sup> *Griffin v. Spence*, 69 Ala. 393; *Welborn v. Coon*, 57 Ind. 270. See "Partnership," *Dec. Dig. (Key No.)* §§ 243-257; *Cent. Dig.* §§ 509-563.

<sup>91</sup> *Richards v. Heather*, 1 B. & A. 29; *Costley v. Wilkerson's Adm'r*, 49 Ala. 210; *Copes v. Fullz*, 1 Sim. & Mar. 623; *NEHRBOSS v. BLISS*, 88 N. Y. 600; *Calder v. Rutherford*, 3 Brod. & Bing. 302; *Dayton v. Bartlett*, 38 Ohio St. 357; *Brooks v. Brooks*, 12 Heisk. (Tenn.) 12. See "Partnership," *Dec. Dig. (Key No.)* §§ 243-257; *Cent. Dig.* §§ 509-563.

*Same—Right to Compensation*

Unless there is an express agreement to that effect, or unless the partnership business must be continued for some time to effect a settlement, a surviving partner is not entitled to compensation for his services merely in closing up the business,<sup>92</sup> "but the tendency is to deal with such questions on their particular circumstances, rather than by absolute rules."<sup>93</sup>

*Same—Power to Dispose of Firm Assets*

For the purpose of paying firm debts, or in the discharge of firm contracts, the surviving partner has full power to dispose of all firm assets, whether they consist of realty or personalty.<sup>94</sup> But since the legal title to firm real estate

<sup>92</sup> *Condon v. Callahan*, 115 Tenn. 235, 89 S. W. 400, 1 L. R. A. (N. S.) 643, 112 Am. St. Rep. 833; *Young v. Scoville*, 99 Iowa, 177, 68 N. W. 670; *AMES v. DOWNING*, 1 Bradf. (N. Y.) 321, Gilmore, Cas. Partnership, 610; *Denver v. Roane*, 99 U. S. 355, 25 L. Ed. 476; *Schenkl v. Dana*, 118 Mass. 236. A partner, rendering services in excess of the mere winding up of the business of the partnership on dissolution by the death of his copartner, is entitled to compensation therefor. *Richards v. Maynard*, 166 Ill. 466, 46 N. E. 1133. See, also, *Aldridge v. Aldridge*, 8 Reports, 189; *Id.*, [1894] 2 Ch. 97; *Jacksonville, M. P. Ry. & Nav. Co. v. Warriner*, 35 Fla. 197, 16 South. 898. See "Partnership," *Dec. Dig. (Key No.)* §§ 253, 255; *Cent. Dig.* §§ 539, 550, 560.

<sup>93</sup> *THAYER v. BADGER*, 171 Mass. 279, 50 N. E. 541, Gilmore, Cas. Partnership, 435. See, also, *Royster v. Johnson*, 73 N. C. 474; *McElroy v. Whitney*, 12 Idaho, 512, 88 Pac. 349.

But the administrator of a surviving partner has been allowed compensation. *Dayton v. Bartlett*, 38 Ohio St. 357. See "Partnership," *Dec. Dig. (Key No.)* §§ 253, 255; *Cent. Dig.* §§ 539, 550, 560.

<sup>94</sup> *Bohler v. Tappan* (D. C.) 1 Fed. 469; *Milner v. Cooper*, 65 Iowa, 190, 21 N. W. 558; *Calvert v. Miller*, 94 N. C. 600; *Loeschigk v. Hatfield*, 51 N. Y. 660; *Bartlett v. Smith*, 5 Neb. (Unof.) 337, 98 N. W. 687; *LINDNER v. ADAMS COUNTY BANK*, 49 Neb. 735, 68 N. W. 1028.

In the case of negotiable paper payable to the firm, he may transfer it by indorsement. This is valid to pass the legal title, but will not create a new liability on the contract of indorsement. *Johnson v. Berlitzheimer*, 84 Ill. 54, 25 Am. Rep. 427; *Bredow v. Mutual Savings Inst.*, 28 Mo. 181. So, also, a surviving partner may assign judgment recovered by the firm. *Thursby v. Lidgerwood*, 69 N. Y. 198. See "Partnership," *Dec. Dig. (Key No.)* § 245; *Cent. Dig.* §§ 514-518.

passes upon the death of a partner to his heirs, the deed of the surviving partner conveys merely an equity to the purchaser, who, however, acquires a right to call upon and compel the heirs to convey the legal title. Performance of the contract will be decreed against the purchaser in favor of the survivor; the heirs being required to join in divesting themselves of any legal title that may have come to them.<sup>95</sup>

Except as to firm real estate, the power of disposition exists for the purpose of turning the assets into cash for purpose of distribution.<sup>96</sup> As to real estate, his power of sale seems to be limited in this country to sales for the payment of debts.<sup>97</sup> If, however, the partnership realty has been converted into personalty by the express terms of the partnership agreement and the will of the deceased partner,<sup>98</sup> or if the law of the particular jurisdiction recognizes such power, then a conveyance by him is effective.<sup>99</sup>

*Same—Power to Pledge or Mortgage*

The power of disposition by a surviving partner is not limited to selling merely. He may pledge or mortgage firm assets as security for a firm debt,<sup>1</sup> or for a loan for firm purposes.<sup>2</sup>

<sup>95</sup> *DELMONICO v. GUILLAUME*, 2 Sandf. Ch. (N. Y.) 366. See "Partnership," *Dec. Dig. (Key No.)* §§ 245, 246; *Cent. Dig.* §§ 514-523.

<sup>96</sup> Cases *supra*, note 94.

<sup>97</sup> See chapter III, §§ 53, 54, pp. 154-169.

<sup>98</sup> *DAVIS v. SMITH*, 82 Ala. 198, 2 South. 897. See, also, chapter III, § 68, p. 215. See "Partnership," *Dec. Dig. (Key No.)* §§ 245, 246; *Cent. Dig.* §§ 514-523.

<sup>99</sup> *Jones v. Sharp*, 9 Helsk. (Tenn.) 660; *Sanborn v. Sanborn*, 11 Grant, Ch. (U. C.) 359. See "Partnership," *Dec. Dig. (Key No.)* §§ 245, 246; *Cent. Dig.* §§ 514-523.

<sup>1</sup> In re *CLOUGH*, L. R. 31 Ch. D. 324. See, also, cases under § 114, notes 41-43, p. 343. See "Partnership," *Dec. Dig. (Key No.)* § 245; *Cent. Dig.* § 516.

<sup>2</sup> *BUTOHART v. DRESSER*, 4 D., M. & G. 542; *Courtland Forging Co. v. Ft. Wayne First Nat. Bank*, 141 Ind. 518, 40 N. E. 1070; *Burchinell v. Koon*, 25 Colo. 59, 52 Pac. 1100. See "Partnership," *Dec. Dig. (Key No.)* §§ 245, 246; *Cent. Dig.* §§ 514-523.

*Same—Power to Assign for Creditors*

Since the surviving partner succeeds to all the rights and power of the partnership, and has entire control over the firm property, he may make an assignment of it for the benefit of the firm creditors, and in doing so may make such preferences among the firm creditors as he sees fit.<sup>3</sup> Nor is the consent of the representatives of the deceased partner necessary.<sup>4</sup> By statute in some states this power has been taken away.<sup>5</sup>

*Same—Power to Collect Claims Due the Firm*

Being the sole representative of the firm, he has the exclusive power to collect claims due the firm.<sup>6</sup> He is the only proper person to receive payment, and he may compel a firm debtor who has paid the administrator of the deceased partner to pay again,<sup>7</sup> or may compel the administrator to turn over the money thus collected by him.<sup>8</sup>

*Same—Power to Complete Existing Contracts*

As the existing obligations of a partnership, which do not call for the personal service of the deceased, continue after

<sup>3</sup> EMERSON v. SENTER, 118 U. S. 3, 6 Sup. Ct. 981, 30 L. Ed. 49; Bartlett v. Smith, 5 Neb. (Unof.) 337, 98 N. W. 687; Patton v. Leftwich, 86 Va. 421, 10 S. E. 686, 6 L. R. A. 569, 19 Am. St. Rep. 902. See "Partnership," Dec. Dig. (Key No.) § 245; Cent. Dig. § 516½; "Assignments for Benefit of Creditors," Dec. Dig. (Key No.) § 30; Cent. Dig. §§ 99-104.

<sup>4</sup> Williams v. Whedon, 109 N. Y. 341, 16 N. E. 365, 4 Am. St. Rep. 460. See "Partnership," Dec. Dig. (Key No.) § 245; Cent. Dig. § 516½.

<sup>5</sup> SHATTUCK v. CHANDLER, 40 Kan. 516, 20 Pac. 225, 10 Am. St. Rep. 227, Gilmore, Oas. Partnership, 236; State v. Withrow, 141 Mo. 69, 41 S. W. 980. See "Partnership," Dec. Dig. (Key No.) § 245; Cent. Dig. § 516½.

<sup>6</sup> Davis v. Sowell, 77 Ala. 262; Cockerham v. Bosley, 52 La. Ann. 65, 26 South. 814; Peters v. Davis, 7 Mass. 257; O'Connell v. Schwanabeck, 76 Mich. 517, 43 N. W. 599; Potter v. Stransky, 48 Wis. 235, 4 N. W. 95. See "Partnership," Dec. Dig. (Key No.) § 245; Cent. Dig. §§ 514, 514½.

<sup>7</sup> Rice v. Richards, 45 N. C. 277; Calvert v. Marlow, 18 Ala. 67. See "Partnership," Dec. Dig. (Key No.) § 245; Cent. Dig. §§ 514, 514½.

<sup>8</sup> Shields v. Fuller, 4 Wis. 102, 65 Am. Dec. 293. See "Partnership," Dec. Dig. (Key No.) § 245; Cent. Dig. §§ 514, 514½.

dissolution, it is the duty and right of a surviving partner to do all necessary and proper acts for the completion of unfinished contracts. Thus, where a firm ordered goods to be manufactured, and one partner dies, the surviving partners were held empowered to receive the goods and pay for them.<sup>9</sup> So, also, the surviving partner may complete a firm contract to cut and manufacture a quantity of lumber.<sup>10</sup> It has also been held that he may borrow money, or pledge firm property,<sup>11</sup> or give a note, if necessary to complete a firm contract.<sup>12</sup> The power to contract is limited to existing and unfinished business. There is no authority to enter into new obligations, except so far as they are necessary to the completion of unfinished transactions. Thus the surviving partner cannot give a note binding his cosurvivors and the estate of the deceased partner.<sup>13</sup> Nor can he make a binding contract of indorsement.<sup>14</sup>

An economical and effective winding up may, however, involve the incurring of some new obligations. For exam-

<sup>9</sup> *Mason v. Tiffany*, 45 Ill. 392; *Miller v. Hoffman*, 26 Mo. App. 199; *Weiss v. Hamilton*, 40 Mont. 99, 105 Pac. 74.

Any loss incurred by a surviving partner in completing a firm contract is chargeable against the firm assets or pro rata against the estate of the deceased partner. *Tompkins v. Tompkins*, 18 S. C. 1.

There is, however, no obligation to complete contracts calling for personal service, where death terminates the liability. *Tasker v. Shepherd*, 6 H. & N. 575. See "*Partnership*," *Dec. Dig. (Key No.)* §§ 247, 248; *Cent. Dig.* §§ 524-528, 549.

<sup>10</sup> *Davis v. Sowell*, 77 Ala. 262. See "*Partnership*," *Dec. Dig. (Key No.)* § 247; *Cent. Dig.* §§ 524-528.

<sup>11</sup> *BUTCHART v. DRESSER*, 10 Hare, 463, 4 D., M. & G. 542. See "*Partnership*," *Dec. Dig. (Key No.)* §§ 245, 248; *Cent. Dig.* §§ 516, 549.

<sup>12</sup> *Mason v. Tiffany*, 45 Ill. 392. See "*Partnership*," *Dec. Dig. (Key No.)* §§ 243, 247, 248; *Cent. Dig.* §§ 513, 524-528, 549.

<sup>13</sup> *Macon Exch. Bank v. Tracy*, 77 Mo. 594; *Matteson v. Nathanson*, 38 Mich. 377. See "*Partnership*," *Dec. Dig. (Key No.)* §§ 243, 247, 248; *Cent. Dig.* §§ 513, 524-528, 549.

<sup>14</sup> *First Nat. Bank of Gainesville v. Cody*, 93 Ga. 127, 19 S. E. 831; *Nat. Exch. Bank of Lexington v. Wilgus' Ex'rs*, 95 Ky. 309, 25 S. W. 2; *Johnson v. Berlitzhelmer*, 84 Ill. 54, 25 Am. Rep. 427; *Bredow v. Mutual Savings Inst.*, 28 Mo. 181. See "*Partnership*," *Dec. Dig. (Key No.)* §§ 243, 247, 248; *Cent. Dig.* §§ 513, 524-528, 549.

ple, where the assets consist of a large amount of unfinished and raw material, which, to be sold without sacrifice, should be manufactured, the surviving partner may work it up, borrowing money or buying more material for that purpose.<sup>18</sup> Likewise reasonable and necessary expenses incident to a legitimate closing up of the business may be incurred.<sup>19</sup>

<sup>18</sup> Calvert v. Miller, 94 N. C. 600; Oliver v. Forrester, 96 Ill. 315; Roach v. Brannon, 57 Miss. 490. See "Partnership," Dec. Dig. (Key No.) § 248; Cent. Dig. § 549.

<sup>19</sup> CENTRAL TRUST, ETC., CO. v. RESPASS, 112 Ky. 606, 66 S. W. 421, 56 L. R. A. 479, 99 Am. St. Rep. 317, Gilmore, Cas. Partnership, 139; Herron v. Wampler, 194 Pa. 277, 45 Atl. 81. See "Partnership," Dec. Dig. (Key No.) § 248; Cent. Dig. § 549.

## CHAPTER VI

### RIGHTS AND DUTIES OF PARTNERS INTER SE

- 123. Duty to Conform to the Partnership Agreement.
- 124. Right to Participate in Management.
- 125. Control of Majority.
- 126. Right to Information Concerning Business.
- 127. Duty to Keep and Right to Inspect Accounts.
- 128. Duty to Devote Themselves to the Business and to Exercise Care and Skill.
- 129. Duty to Observe Good Faith.
- 130. Right to Benefits from Transactions Concerning Firm Interests.
- 131. Right to Benefits from Information Obtained as Partner.
- 132. Right to Carry on Separate Business.
- 133. Right to Compensation for Services.
- 134. Right to Indemnity and Contribution.
- 135. Right to an Accounting.
- 136. Distribution of Assets among Partners.
- 137. Partner's So-Called Lien.

### DUTY TO CONFORM TO THE PARTNERSHIP AGREEMENT

123. It is the duty of the partners to conform their actions to the agreement between them, whether this agreement is contained in a formal written instrument, known as the "Articles of Partnership," or whether informal or left to the implication of law.

It has already been noted that partners may make their respective rights and liabilities whatever they see fit.<sup>1</sup> While not indispensable, it is far safer to embody the agreement of the partners in a formal instrument, known as the "Articles of Partnership," to which the partners may refer as a guide in all their transactions. These "Articles" should state the general nature of the business, the capital and the shares of the various partners, the powers of the respective

<sup>1</sup> Ante, chapter V, § 85, p. 275, and chapter II, § 22, p. 69.

partners, the distribution of profits, and any other pertinent agreement the members care to insert. But whether this contract be fully stated, or its details left to implication of law, it is obvious that it is the duty of the partners to conform thereto. Every known deviation from this duty may afford the occasion for a dissolution, and make it obligatory upon the guilty partner to indemnify his copartners for the loss they suffer from his breach of contract. Thus, where a firm suffered a loss by reason of one partner signing the firm name to accommodation paper, in breach of the partnership agreement, such partner was held individually liable to his copartners for the amount of the loss.<sup>3</sup>

### RIGHT TO PARTICIPATE IN MANAGEMENT

- 124.** In the absence of an express agreement to the contrary, all the members of a partnership have equal rights in the management of the firm business. But the partners may by agreement confer exclusive management on one or more of their number.

Although the duties and obligations arising from the relation between the partners are regulated by the express agreement between themselves, so far as such express contract extends and continues in force,<sup>3</sup> it is possible that, even on so important a subject as just what share each member is to have in the management of the firm business, their contract may be silent. Where this is the case, it will be presumed that the powers of the various partners are equal, even though their shares may be unequal.<sup>4</sup> If a partner is

<sup>3</sup> *MURPHY v. CRAFTS*, 13 La. Ann. 519, 71 Am. Dec. 519, Gilmore, *Cas. Partnership*, 433. See post, § 134, p. 387, *Indemnity and Contribution*; *Robinson v. Bullock*, 58 Ala. 618. See "*Partnership*," *Dec. Dig. (Key No.)* §§ 83, 88; *Cent. Dig.* §§ 133, 136.

<sup>3</sup> *Shamburg v. Citizens' Bank*, 35 Pittsb. Leg. J. (Pa.) 37. See "*Partnership*," *Dec. Dig. (Key No.)* § 79; *Cent. Dig.* § 127.

<sup>4</sup> *KATZ v. BREWINGTON*, 71 Md. 79, 20 Atl. 139, Gilmore, *Cas. Partnership*, 433; *Peacock v. Peacock*, 16 Ves. 51. A partner does not lose his right to a voice in the management of firm affairs by pledging his share in the business to secure an individual debt. Wil-

unjustly excluded from this right of participation in the management of the firm affairs, whether the right be expressly or impliedly given, he may have his remedy by injunction.<sup>5</sup> Although a court of equity is loath to take charge of a partnership and compel the partners to behave themselves, still it will, when one partner is excluding a copartner or denying him his rights, take jurisdiction to determine what his rights are under the partnership agreement, and will enjoin his copartner from interfering with the free exercise of those rights; nor is it necessary that a dissolution be asked for in such cases.<sup>6</sup> A willful exclusion, however, is ordinarily sufficient ground for a dissolution, and will of itself justify the court in appointing a receiver to take charge of the firm assets pending a winding up.<sup>7</sup> It is always possible for the partners to agree among themselves that one or more of them shall have exclusive management of the partnership affairs, or they may stipulate that the management of certain phases of the business shall be committed exclusively to one and other phases exclusively to another.

cox v. Pratt, 125 N. Y. 688, 25 N. E. 1091, affirmed 52 Hun, 340, 5 N. Y. Supp. 361. See "*Partnership*," *Dec. Dig. (Key No.)* § 79; *Cent. Dig.* § 127.

<sup>5</sup> Miller v. O'Boyle (O. C.) 89 Fed. 140; Livingston v. Lynch, 4 Johns. Ch. (N. Y.) 573; Jennings' Appeal (Pa.) 16 Atl. 19, 2 L. R. A. 43; Abbot v. Johnson, 32 N. H. 9. For the effect on third persons of secret limitations on a partner's authority, see ante, chapter V, § 86 et seq., p. 276 et seq. See "*Partnership*," *Dec. Dig. (Key No.)* §§ 79, 118; *Cent. Dig.* §§ 127, 181.

<sup>6</sup> PIRTLE v. PENN, 3 Dana (Ky.) 247, 28 Am. Dec. 70, Gilmore, Cas. Partnership, 480; Rutland Marble Co. v. Ripley, 10 Wall. 339, 19 L. Ed. 955.; Wolbert v. Harris, 7 N. J. Eq. 605. See "*Partnership*," *Dec. Dig. (Key No.)* §§ 79, 118, 273; *Cent. Dig.* §§ 127, 181, 620.

<sup>7</sup> Barnes v. Jones, 91 Ind. 161; Parkhurst v. Muir, 7 N. J. Eq. 307; Hottenstein v. Conrad, 9 Kan. 437; Wilson v. Greenwood, 1 Swanst. 471; Blakeney v. Dufaur, 15 Beav. 40. See "*Partnership*," *Dec. Dig. (Key No.)* § 79; *Cent. Dig.* § 127.

### SAME—CONTROL OF MAJORITY

125. In the absence of express provision in the partnership agreement to the contrary, the majority of the partners in a firm of more than two have power to decide all questions arising in the ordinary course of the partnership business, providing they act in good faith for the interest of the firm as a whole, as contrasted with the private interest of all or any of the majority, and all of the partners are consulted.

All transactions with third parties, conducted by the majority acting within the scope of the partnership business, will bind the minority. In a firm of two, one member, by dissent duly communicated to a third person, may prevent the creation of new obligations. While the questions of the power of a majority of the partners to control the minority has been much discussed, and there has been caution manifested in stating any definite rule, the proposition embodied in the first part of the black-letter type is supported by authority, when dealing with the rights of the partners *inter se* in a firm composed of more than two members.<sup>a</sup>

<sup>a</sup> *JOHNSTON v. DUTTON'S ADM'R*, 27 Ala. 245, Gilmore, Cas. Partnership, 391; *Campbell v. Bowen*, 49 Ga. 417; *Western Stage Co. v. Walker*, 2 Iowa, 504, 65 Am. Dec. 789; *PEACOCK v. CUMMINGS*, 46 Pa. 434; *Irvine v. Forbes*, 11 Barb. (N. Y.) 587; *Kirk v. Hodgson*, 3 Johns. Ch. (N. Y.) 400.

The English Partnership Act of 1890, § 24 (8), provides: "Any difference arising as to ordinary matters connected with the partnership business may be decided by a majority of the partners, but no change may be made in the nature of the partnership business without the consent of all existing partners." For comments thereon, see *Pollock's Digest of Part. (8th Ed.)* 79.

For a similar provision, see *Civ. Code Cal.* § 2428.

In *Const v. Harris*, *Turner & R.* 518, 525, Lord Eldon said: "I call that the act of all which is the act of the majority, acting bona fide, meeting, not for the purpose of negating what any one may have to offer, but for the purpose of negating what, when they are met together, they may, after due consideration, think proper to negative. For a majority of partners to say, 'We do not care what

*Control Inter Se in a Firm of More than Two Members*

In considering the question, a distinction should be drawn between cases arising among the partners inter se and those involving third persons. Again, as between the partners themselves, the control of the majority will depend upon the nature of the act. The basis of the majority's power rests upon an implied consent derived from the partnership contract. When several persons associate in a business venture as partners, it is reasonable to imply that they intend, in the absence of an expressed contrary intention, that the judgment of the majority shall control with respect to the conduct of all matters arising in the ordinary course of the firm business. "There is always an implied understanding that the acts of the majority are to prevail over those of the minority as to all matters within the scope of the common business."<sup>9</sup> The majority may, for instance, determine when and how much of the profits are to be divided, unless otherwise provided for by agreement.<sup>10</sup> Or the majority may decide to devote the firm assets to a pro rata distribution among the firm creditors. A minority partner cannot then mortgage those assets to a firm creditor who is aware of the majority decision.<sup>11</sup>

This implied consent to majority control, however, does not exist as to unusual and extraordinary transactions. Thus the majority cannot, against the wishes of a dissent-

one partner may say, we, being the majority, will do what we please,' is, I apprehend, what this court will not allow. \* \* \* In all partnerships, whether it is expressed in the deed or not, the partners are bound to be true and faithful to each other. They are to act upon the joint opinion of all, and the discretion and judgment of any one cannot be excluded. What weight is to be given to it is another question." See "*Partnership*," *Dec. Dig. (Key No.)* §§ 79, 130; *Cent. Dig.* §§ 127, 195.

<sup>9</sup> *JOHNSTON v. DUTTON'S ADM'R*, 27 Ala. 245, Gilmore, Cas. Partnership, 391. See "*Partnership*," *Dec. Dig. (Key No.)* §§ 79, 130; *Cent. Dig.* §§ 127, 195.

<sup>10</sup> *Robinson v. Thompson*, 1 Vern. 465; *Stevens v. Railway Co.*, 9 Hare, 313. See "*Partnership*," *Dec. Dig. (Key No.)* §§ 79, 130; *Cent. Dig.* §§ 127, 195.

<sup>11</sup> *CARR v. HERTZ*, 54 N. J. Eq. 127, 33 Atl. 194, affirmed in 54 N. J. Eq. 700, 37 Atl. 1117. See "*Partnership*," *Dec. Dig. (Key No.)* §§ 130, 133; *Cent. Dig.* §§ 195, 199.

ing partner, engage the firm in a different business than that in which it was originally engaged;<sup>12</sup> nor enlarge the scope of the business, so as to include dealing in commodities expressly eliminated by the partnership agreement;<sup>13</sup> nor delegate to a manager the right to sign the firm name;<sup>14</sup> nor decide where the business of the partnership is to be carried on after the expiration of the lease on the regular place of business.<sup>15</sup>

*Same—Majority Must Act in Good Faith*

The power of the majority to control as to all matters within the ordinary scope of the firm business must, however, be exercised in fairness and good faith, and not arbitrarily or capriciously, or for private advantage.<sup>16</sup> Fairness requires that they should consult all the members of the firm, and give all a chance to present their objections.<sup>17</sup>

*Same—Control Inter Se in a Firm of Two Members*

As to extraordinary acts outside the scope of the firm business, one partner cannot control the other, for the reasons already noticed.<sup>18</sup> As to transactions within the ordinary scope of the business, and affecting only the partners inter se, there is no occasion for the application of the right of control. Prima facie the rights of the partners are equal, and there is no reason to suppose that in the firm of two

<sup>12</sup> *Zabriskie v. Hackensack & N. Y. R. Co.*, 18 N. J. Eq. 178, 90 Am. Dec. 617; *Lindl. Part.* p. 316, citing *Natusch v. Irving, Gow* on *Part.* (3d Ed.) App. 398. See "*Partnership*," *Dec. Dig. (Key No.)* § 130; *Cent. Dig.* § 195.

<sup>13</sup> *Jennings' Appeal* (Pa.) 16 Atl. 19, 2 L. R. A. 43. See "*Partnership*," *Dec. Dig. (Key No.)* § 130; *Cent. Dig.* §§ 181, 195.

<sup>14</sup> *Beveridge v. Beveridge*, L. R. 2 H. L. Sc. 183. See "*Partnership*," *Dec. Dig. (Key No.)* §§ 79, 130; *Cent. Dig.* §§ 127, 195.

<sup>15</sup> *Clements v. Norris*, 8 Ch. Div. 129. See "*Partnership*," *Dec. Dig. (Key No.)* §§ 79, 130; *Cent. Dig.* §§ 127, 195.

<sup>16</sup> *Blisset v. Daniel*, 10 Hare, 493; *JOHNSTON v. DUTTON'S ADM'R*, 27 Ala. 245, *Gilmore, Cas. Partnership*, 391; *Western Stage Co. v. Walker*, 2 Iowa, 513, 65 Am. Dec. 789; *Wall v. London & Nassetts Corp.*, [1898] 2 Ch. 469. See "*Partnership*," *Dec. Dig. (Key No.)* § 130; *Cent. Dig.* § 195.

<sup>17</sup> *Id.*; *Const v. Harris, Turner & R.* 516; *Story, Part.* § 123. See "*Partnership*," *Dec. Dig. (Key No.)* § 130; *Cent. Dig.* § 195.

<sup>18</sup> See cases, notes 8-17, pp. 364-366, *supra*.

only the judgment of one should control the judgment of the other. If they are unable to agree, and the partnership articles make no provision for the settlement of such differences, there would seem to be nothing to do but to dissolve the relation.

*Same—Power of Control—Rights of Third Parties*

The nature and scope of the powers of the members of a partnership have already been discussed.<sup>19</sup> Each partner has authority, implied from the agreement out of which the relation springs, to bind his copartners in all matters within the scope of the partnership business. Transactions carried on by one partner within this limit are binding on the firm; without that limit the firm is not bound, in the absence of explicit authorization or subsequent ratification. The power which thus belongs to one partner belongs to a majority of the partners in a firm composed of more than two members. So far as third persons are concerned, a transaction carried on by a majority of the partners, acting within the ordinary scope of the firm business, will bind all. Thus one purchasing the partnership goods from two of the three members of a firm in good faith and without collusion acquires a perfect title, though notified by the third partner of his repudiation of the sale.<sup>20</sup>

Since a single partner has no implied power to bind the firm by acts beyond the scope of the firm business, so a majority of the partners have no such power.<sup>21</sup> Obviously the majority have no power to bind the minority to third persons with respect to unusual transactions not within the ordinary course of the firm business. Of this fact third persons must take notice. If, for instance, a firm is composed of more than two members, and one of them dissents

<sup>19</sup> Chapter V, § 86 et seq., p. 276.

<sup>20</sup> *Staples v. Sprague*, 75 Me. 458; *Blisset v. Daniel*, 10 Hare, 493; *JOHNSTON v. DUTTON'S ADM'R*, 27 Ala. 245, *Gilmore, Cas. Partnership*, 391; *Western Stage Co. v. Walker*, 2 Iowa, 513, 65 Am. Dec. 789; *Cotton Plant Oil Mill Co. v. Buckeye Cotton Oil Co.*, 92 Ark. 271, 122 S. W. 658; *Markle v. Wilbur*, 200 Pa. 457, 50 Atl. 204. See "*Partnership*," *Dec. Dig. (Key No.)* § 141; *Cent. Dig.* §§ 214-221.

<sup>21</sup> The authorities cited in the preceding note by implication sustain the last proposition in the text.

to a contemplated contract, the party with whom the contract is made acts at his peril, and cannot hold the dissenting partner liable, unless his liability results from the partnership articles or the nature of the partnership contract.<sup>22</sup>

*Same—Rights of Third Parties—Dissent by One of a Firm of Two Members*

In a partnership of two persons there is ordinarily no power of control by one of the other. As to transactions within the scope of the business, each is agent for the other. But, even as to acts falling within this scope, one partner may, by dissenting and giving notice thereof to third parties, prevent his copartner from binding him by any new undertakings. Thus, if one member of a trading firm of two persons refuses to consent to the issue of negotiable paper, a payee, taking with notice of such dissent, cannot enforce it against the firm.<sup>23</sup> Where goods have been sold to a firm against the known wishes of a dissenting partner, the mere fact that the goods came to the use of the firm does not impose any liability on the dissenting partner to pay for them; for the purchase may have been made at a loss, which he foresaw, and, therefore, sought to avoid.<sup>24</sup> One partner cannot engage a new, nor dismiss an old, servant against the will of his copartner.<sup>25</sup> Where both partners have assented to a firm contract not limited to a definite period, either can keep it in force against the wishes of his copartner; for the partner who is opposed to change has always the advantage of position.<sup>26</sup>

<sup>22</sup> See cases cited in notes 8-17, pp. 364-366.

<sup>23</sup> *Leavitt v. Peck*, 3 Conn. 124, 8 Am. Dec. 157; *Wilkins v. Pearce*, 5 Denio (N. Y.) 541. See "*Partnership*," *Dec. Dig. (Key No.)* §§ 133, 146; *Cent. Dig.* §§ 199, 242.

<sup>24</sup> *MONROE v. CONNER*, 15 Me. 178, 32 Am. Dec. 148, *Gilmore, Cas. Partnership*, 895. See, however, *Johnston v. Bernheim*, 86 N. C. 339. Notice of dissent may be effectively given by a dormant partner, and to one who knew nothing of the existence of the partnership. *Leavitt v. Peck*, 3 Conn. 124, 8 Am. Dec. 157; *Wipperman v. Stacy*, 80 Wis. 345, 50 N. W. 336. See "*Partnership*," *Dec. Dig. (Key No.)* §§ 133, 141; *Cent. Dig.* §§ 199, 214.

<sup>25</sup> *Donaldson v. Williams*, 1 Crompt. & M. 345. See "*Partnership*," *Dec. Dig. (Key No.)* § 140; *Cent. Dig.* § 212.

<sup>26</sup> *Clement v. Norris*, 8 Ch. Div. 129; *BUTCHART v. DRESSER*.

The dissent of one partner will not, however, deprive his copartner of the powers that the partnership articles expressly or impliedly confer upon him, so as to impose additional burdens upon third persons. One partner cannot, for example, by notifying debtors not to pay his copartner, prevent the latter from receiving payment of firm debts;<sup>27</sup> nor prevent his partner from paying a firm debt, even though such payment may amount to a preference.<sup>28</sup>

*Same—Waiver of Dissent*

It is always possible for a dissenting partner to waive the effect of his dissent. Evidence of such waiver is frequently found in the acceptance and use of the proceeds of the act dissented from. Thus, where one partner refused to consent to the act of his copartner in procuring the acceptance of a draft, but afterwards received the draft and used it for firm purposes, he was held to have waived his dissent.<sup>29</sup>

*Remedies of Dissenting Partner*

If the dissenting partner is not satisfied, he may retire from the firm; or, if the act to which he objects is one the other member or members have no authority to do, he may obtain an injunction.<sup>30</sup>

<sup>4</sup> De G., M. & G. 542. See "Partnership," Dec. Dig. (Key No.) §§ 79, 139; Cent. Dig. §§ 127, 206-213.

<sup>27</sup> Gillilan v. Sun Mut. Ins. Co., 41 N. Y. 376. See "Partnership," Dec. Dig. (Key No.) §§ 133, 143; Cent. Dig. §§ 197-199, 230.

<sup>28</sup> MABBETT v. WHITE, 12 N. Y. 442. See "Partnership," Dec. Dig. (Key No.) §§ 133, 143; Cent. Dig. §§ 197-199, 229, 231.

<sup>29</sup> Pearce v. Wilkins, 2 N. Y. 469. See, also, Johnston v. Bernhelm, 86 N. C. 339; Mason v. Partridge, 66 N. Y. 633. See "Partnership," Dec. Dig. (Key No.) §§ 133, 155; Cent. Dig. §§ 197-199, 278-280.

<sup>30</sup> Abbot v. Johnson, 32 N. H. 9; Natusch v. Irving, 2 Cooper's Ch. 358; Bates, Partn. § 435. See "Partnership," Dec. Dig. (Key No.) §§ 118, 272; Cent. Dig. §§ 181, 619.

## RIGHT TO INFORMATION CONCERNING BUSINESS

126. Each partner has the right to full information concerning the partnership affairs and the manner in which its business is conducted.

Even though a partner may leave the active management of the business altogether to the other members of the firm, he does not thereby waive his right to be informed of all the firm's operations, and to investigate all its acts to satisfy himself that good faith and good business methods are being observed. This involves a corresponding duty of members of the firm so to manage that there shall be no concealment one from another, whether willfully or negligently, of what is being done of common concern.<sup>21</sup> If, accordingly, one partner fails to notify his copartners of the service of process upon him in a suit against the firm, and subsequently judgment is rendered against the firm, and execution issued against firm property, he becomes liable to his copartners for breach of his duty to inform them.<sup>22</sup> In every important exigency the partner about to act should consult the other partner, and where, through his negligence in failing to do so, loss occurs to him, he cannot compel his partner to share therein.<sup>23</sup> This applies as well to persons who are negotiating to become partners as to those who already are partners.<sup>24</sup>

<sup>21</sup> *YORKS v. TOZER*, 59 Minn. 78, 60 N. W. 846, 23 L. R. A. 86, 50 Am. St. Rep. 395, Gilmore, Cas. Partnership, 440; 1 Colly. Partn. § 163, citing *Goodman v. Whitcomb*, 1 Jac. & W. 593, per Lord Eldon. See "*Partnership*," *Dec. Dig. (Key No.)* §§ 70, 88; *Cent. Dig.* §§ 114, 136.

<sup>22</sup> *Devall v. Burbridge*, 6 Watts & S. (Pa.) 529; *YORKS v. TOZER*, 59 Minn. 78, 60 N. W. 846, 23 L. R. A. 86, 50 Am. St. Rep. 395, Gilmore, Cas. Partnership, 440. See "*Partnership*," *Dec. Dig. (Key No.)* § 88; *Cent. Dig.* § 136.

<sup>23</sup> *YORKS v. TOZER*, *supra*. In this case one partner, without consulting the other, bought out an invalid, but what he supposed was a valid, claim against the firm real estate. See "*Partnership*," *Dec. Dig. (Key No.)* §§ 88, 101; *Cent. Dig.* §§ 136, 155.

<sup>24</sup> *Fawcett v. Whitehouse*, 1 Russ. & M. 132. See "*Partnership*," *Dec. Dig. (Key No.)* §§ 88, 101; *Cent. Dig.* §§ 136, 155.

## DUTY TO KEEP AND RIGHT TO INSPECT ACCOUNTS

127. It is a partner's duty to keep correct accounts of his transactions for the firm and to allow them to be examined by his copartners.

If a partner is to have information as to the status of the partnership business, it is necessary that accurate accounts of the firm transactions should be kept, and be open to his inspection.<sup>55</sup> The articles of partnership usually delegate this general duty of keeping the firm accounts to one partner, or to a clerk; in either case it is the duty of each partner to give the bookkeeper all necessary information.<sup>56</sup> In the absence of an agreement on the subject, the duty of keeping the books rests equally upon each partner.<sup>57</sup> To allow each partner convenient access thereto, the books should be kept at the firm's place of business, and no partner should remove them without the consent of the others.<sup>58</sup> So strictly guarded is the right to inspect firm accounts

<sup>55</sup> KATZ v. BREWINGTON, 71 Md. 79, 20 Atl. 139, Gilmore, Cas. Partnership, 433; Saunders v. Duval's Adm'r, 19 Tex. 467; Godfrey v. White, 43 Mich. 171, 188, 5 N. W. 243; Knapp v. Edwards, 57 Wis. 191, 15 N. W. 140; Chandler v. Sherman, 16 Fla. 99; Rowe v. Wood, 2 Jac. & W. 558, per Lord Eldon; Goodman v. Whitcomb, 1 Jac. & W. 539. Cf. Vermillion v. Bailey, 27 Ill. 320. See "Partnership," Dec. Dig. (Key No.) §§ 80, 81; Cent. Dig. §§ 128, 129.

<sup>56</sup> Dimond v. Henderson, 47 Wis. 172, 2 N. W. 73; Knapp v. Edwards, 57 Wis. 191, 15 N. W. 140; Webb v. Fordyce, 55 Iowa, 11, 7 N. W. 385; Pomeroy v. Benton, 77 Mo. 64; Hall v. Clagett, 48 Md. 223; Pierce v. Scott, 37 Ark. 308; Kelley v. Greenleaf, 3 Story, 105, Fed. Cas. No. 7,657. See "Partnership," Dec. Dig. (Key No.) §§ 80, 81; Cent. Dig. §§ 128, 129.

<sup>57</sup> Morris v. Griffin, 88 Iowa, 327, 49 N. W. 846. See, also, cases previously cited. But in Theall v. Lacey, 5 La. Ann. 548, it was held that the keeping of regular books of account was not to be expected in a partnership orally contracted between mother and son for conducting a plantation. See "Partnership," Dec. Dig. (Key No.) §§ 80, 81; Cent. Dig. §§ 128, 129.

<sup>58</sup> Goodman v. Whitcomb, 37 Eng. Reprint, 492; Greatrex v. Greatrex, 1 De G. & S. 692, 11 Jur. 1052, 63 Eng. Reprint, 1254; Taylor

that even the private books of a partner, from which he transcribes accounts into the firm books, must on demand be shown.<sup>39</sup> Unless he has bargained away the right, each partner may, without the permission of the others, not only inspect and examine the firm books, but also make extracts from them.<sup>40</sup> But he may not inspect and make copies from the books for an improper purpose, such as soliciting customers of the firm to patronize him in his individual competing business.<sup>41</sup>

Unless impeachable for fraud or mutual mistake, the periodical statements of account for the firm are to be treated as conclusive on the partners.<sup>42</sup> If, however, the partner whose duty it is to keep the books culpably neglects his duty by not keeping them at all, by keeping them unintel-

v. Davis, 3 Beav. 388, note; Charlton v. Poulter, 19 Ves. 148, note. See "Partnership," Dec. Dig. (Key No.) §§ 80, 81; Cent. Dig. §§ 128, 129.

<sup>39</sup> Toulmin v. Copland, 3 Y. & C. Ex. 625, 660, 661; Freeman v. Fairlie, 3 Mer. 43. But see Ward v. Apprice, 6 Mod. 264. A solvent partner is entitled to retain the firm books as against the trustee in bankruptcy of a copartner. Ex parte Freeman, 4 Deac. & C. 404; Ex parte Finch, 1 Deac. & C. 274. See "Partnership," Dec. Dig. (Key No.) §§ 80, 81; Cent. Dig. §§ 128, 129.

<sup>40</sup> Taylor v. Rundell, 1 Younge & C. Ch. 128, 1 Phil. Ch. 222; Stuart v. Lord Bute, 12 Sim. 400. See "Partnership," Dec. Dig. (Key No.) §§ 80, 81; Cent. Dig. §§ 128, 129.

<sup>41</sup> A partner who has no share in the good will of the business has no right, during the existence of the partnership to extract from its books the names and addresses of customers for the purpose of soliciting such customers on his own behalf after the termination of the partnership. TREGO v. HUNT, [1896] A. C. 7, 65 L. J. Ch. 1, 73 L. T. Rep. (N. S.) 514, 44 Wkly. Rep. 225. See "Partnership," Dec. Dig. (Key No.) §§ 80, 81; Cent. Dig. §§ 128, 129.

<sup>42</sup> Stretch v. Talmadge, 65 Cal. 510, 4 Pac. 513; Gage v. Parmelee, 87 Ill. 329; Broderick v. Beaupre, 40 Minn. 379, 42 N. W. 83. The bookkeeping of a partner cannot be questioned by one who is in pari delicto, or chargeable with laches. Carpenter v. Camp, 39 La. Ann. 1024, 30 South. 269; Lewis v. Loper (C. C.) 54 Fed. 237; Of. Shoemaker v. Shoemaker, 92 S. W. 546, 29 Ky. Law Rep. 134; Albee v. Wachter, 74 Ill. 173; Stuart v. McKichan, 74 Ill. 122; Keys v. Baldwin, 10 Ohio Dec. (Reprint) 268, 19 Wkly. Law Bul. 375. See "Partnership," Dec. Dig. (Key No.) §§ 80, 81; Cent. Dig. §§ 128, 129.

ligibly, or by destroying or hiding them, every presumption will be indulged against him.<sup>43</sup>

### DUTY TO DEVOTE THEMSELVES TO THE BUSINESS AND TO EXERCISE CARE AND SKILL

128. It is the duty of each member of a partnership, in the absence of an exemption therefrom, to devote his entire time and energies to the partnership affairs. So long as he acts in good faith, and in the exercise of reasonable skill and diligence, and within the scope of the firm business, he is not responsible to his copartners for losses occasioned by his acts.

The partnership relation demands that each member should bend his utmost energies and devote all his time to the partnership affairs. So fundamental is this duty that the most sweeping assertion of it in the articles of partnership are held to be mere surplusage.<sup>44</sup> If a partner wishes to be free to indulge in outside enterprises and to secure individual profits, he should see to it that permission therefor is given him by the partnership agreement. The law will not otherwise tolerate his becoming involved in interests that may either divert his attention from the partner-

<sup>43</sup> *Knapp v. Edwards*, 57 Wis. 191, 15 N. W. 140; *Pierce v. Scott*, 37 Ark. 308; *Walmsley v. Walmsley*, 8 Jones & L. 556; *Gray v. Haig*, 20 Beav. 219. "Omnia præsumentur contra spoliatores." It is the duty of continuing or surviving partners so to keep the accounts of the firm to show the position of the firm at any time when a change among its members occurred. *Boddam v. Ryley*, 1 Brown, Ch. 239; *Id.*, 2 Brown, Ch. 2, 4 Brown, Part. Cas. 561; *Ex parte Toulmin*, 1 Mer. 598, note; *Toulmin v. Copland*, 3 Younge & C. 655. But no presumptions will be indulged where, for over 20 years, the partners assented to a defective system of bookkeeping. *Shoemaker v. Shoemaker*, 92 S. W. 546, 29 Ky. Law Rep. 134 (1906). See "Partnership," *Dec. Dig. (Key No.)* §§ 80, 81; *Cent. Dig.* §§ 128, 129; "Evidence," *Dec. Dig. (Key No.)* § 78; *Cent. Dig.* § 98.

<sup>44</sup> *Moynihan v. Drobaz*, 124 Cal. 212, 56 Pac. 1026, 71 Am. St. Rep. 46; *Pollock's Digest of Partnership* (6th Ed.) 88. See "Partnership," *Dec. Dig. (Key No.)* §§ 70, 83, 92; *Cent. Dig.* §§ 114, 131, 139.

ship welfare or, by imperiling his own credit, affect likewise that of his firm.<sup>45</sup> The injured partners have their remedy by injunction, by petition for dissolution, or by action for damages.<sup>46</sup>

#### *Degree of Skill Required*

Yet in his devotion to the firm business a partner does not guarantee that he will exercise the very highest degree of skill and diligence. His duty is performed if he transacts the business of the firm with reasonable care, economy, skill, and diligence.<sup>47</sup> If one of a firm of bankers causes loss to his firm by an honest error in judgment as to an investment, he is under no liability to indemnify them.<sup>48</sup> So long as his act is not wanton or fraudulent, a partner cannot be charged up for his lack of discretion or good judgment.<sup>49</sup>

### DUTY TO OBSERVE GOOD FAITH

**129.** Partnership is a relation of trust and confidence, and partners must observe the utmost good faith towards each other in all of their transactions, from the time they begin negotiations with each other to the complete settlement of the partnership affairs.

<sup>45</sup> *Dean v. McDowell*, 8 Ch. D. 345, 348. See "*Partnership*," *Dec. Dig.* (Key No.) §§ 70, 83, 92-101; *Cent. Dig.* §§ 114, 131, 139-155.

<sup>46</sup> But they are not entitled to any share of the profits gained in the separate business, unless it is a competitive business. See post, §§ 130-132, pp. 378-384; *LATTA v. KILBOURN*, 150 U. S. 524, 14 Sup. Ct. 201, 37 L. Ed. 1169, *Gilmore, Cas. Partnership*, 425. See "*Partnership*," *Dec. Dig.* (Key No.) §§ 86, 99; *Cent. Dig.* §§ 134, 153.

<sup>47</sup> *Yetzer v. Applegate*, 83 Iowa, 726, 50 N. W. 66; *MORRIS v. WOOD* (Tenn. Ch.) 35 S. W. 1013. See "*Partnership*," *Dec. Dig.* (Key No.) §§ 70, 88; *Cent. Dig.* §§ 114, 136.

<sup>48</sup> *Exchange Bank of Leon v. Gardner*, 104 Iowa, 176, 73 N. W. 591. See, also, *Tygart v. Wilson*, 39 App. Div. 58, 56 N. Y. Supp. 827; *Savery v. Thurston*, 4 Ill. App. 55. See "*Partnership*," *Dec. Dig.* (Key No.) §§ 70, 85, 88; *Cent. Dig.* §§ 114, 133, 136.

<sup>49</sup> *CHARLTON v. SLOAN*, 76 Iowa, 288, 41 N. W. 303, *Gilmore, Cas. Partnership*, 439; *Knipe v. Livingston*, 209 Pa. 49, 57 Atl. 1130; *Fordyce v. Shriver*, 115 Ill. 530, 5 N. E. 87. See "*Partnership*," *Dec. Dig.* (Key No.) §§ 70, 88; *Cent. Dig.* §§ 114, 136.

*In General*

The duty of each partner to exercise toward the others the highest integrity and good faith is the very basis of their mutual rights in all partnership matters.<sup>50</sup> As the partnership relation is one of mutual confidence and trust, every member is obligated in all partnership affairs to consider the mutual welfare of all the partners, rather than his own private benefit. If, therefore, he attempts to secure any private advantage from any transaction concerning the partnership, or from any wrongful use of the partnership name or property to his own ends, he violates his cardinal duty, and must account to his associates for the benefits received through its breach.<sup>51</sup> Therefore, if a partner obtains a commission from a third person for inducing the firm to enter into any particular transaction, he is likely to think more of his private advantage than of the welfare of the firm. The law, accordingly, insists on his sharing such commission with his associates.<sup>52</sup> In *Fouse v. Shelley* <sup>53</sup>

<sup>50</sup> *BURTON v. WOOKEY*, 6 Madd. 367, Gilmore, Cas. Partnership, 418; *MITCHELL v. REED*, 61 N. Y. 123, 19 Am. Rep. 252, Gilmore, Cas. Partnership, 419; *JENNINGS et al. v. RICKARD*, 10 Colo. 395, 15 Pac. 677, Gilmore, Cas. Partnership, 421; *Wiggins v. Markham*, 131 Iowa, 102, 108 N. W. 113; *Whitney v. Dewey*, 158 Fed. 385, 86 C. C. A. 21; *Fouse v. Shelly*, 64 W. Va. 425, 63 S. E. 208; *Finn v. Young*, 50 Wash. 543, 97 Pac. 741. See "*Partnership*," *Dec. Dig. (Key No.)* §§ 25, 70, 88, 154; *Cent. Dig.* §§ 11, 114, 136, 276.

<sup>51</sup> *MITCHELL v. REED*, 61 N. Y. 123, 19 Am. Rep. 252, Gilmore, Cas. Partnership, 419; *Pollock's Digest of Part. (8th Ed.)* pp. 92-94; *McAlpine v. Millen*, 104 Minn. 289, 116 N. W. 583. If one partner, in fraud of his copartner's rights, abstracts funds and invests them in property in his own name, or in that of his wife or of a third person, or uses them to pay off incumbrances upon his own property or that of his wife, the defrauded partners can follow the funds; but there must be some element of fraud in the appropriation. Thus mere overdrafts give no right to proceed against the separate estate. *Stone v. Baldwin*, 228 Ill. 338, 80 N. E. 890, affirmed 127 Ill. App. 563. See "*Partnership*," *Dec. Dig. (Key No.)* §§ 70, 81, 88, 92-101, 154; *Cent. Dig.* §§ 114, 129, 136, 139-155, 276.

<sup>52</sup> *Newell v. Cochran*, 41 Minn. 374, 43 N. W. 84; *Esmond v. Seeley*, 28 App. Div. 292, 51 N. Y. Supp. 36. That a partner may act as agent for a third person in dealing with the firm, where the firm is

<sup>53</sup> *Supra*, note 50.

defendant secured an option on 1,600 acres of land and formed a partnership with plaintiffs in order to procure the necessary funds. He represented to them that there were only 850 acres, and upon buying the land had the vendor make two deeds, one for 850 acres to the firm, and the other to himself individually for the balance. In a suit by his co-partners, the court declared that he held the land conveyed him in trust for the firm.

#### *Preliminary Negotiations*

This obligation to perfect fairness and good faith is not confined to persons who actually are partners, but applies in all stages of their connection. There is some authority for the proposition that with regard to the preliminary negotiation of prospective partners the rule of caveat emptor applies, and each may therefore secure for himself such share in the contemplated firm as he can.<sup>54</sup> The tendency of the cases, however, is undoubtedly to require frank disclosure and honest dealing from the very first.<sup>55</sup> Thus one who contemplated forming a partnership may not appropriate to himself alone the gain from buying at a low figure, and selling to his firm at a higher, the property in which the firm is designed to deal.<sup>56</sup> If one partner induces the other to enter into copartnership with him by fraudulent representations, the latter may have the partnership contract annulled, without showing actual damage, and may further recover the value of what he has contributed to

not harmed, see *Randolph Bank v. Armstrong*, 11 Iowa, 515; *Westcott v. Tyson*, 38 Pa. 389. Cf. *Fryer v. Harker*, 142 Iowa, 708, 121 N. W. 526, 23 L. R. A. (N. S.) 477. See "*Partnership*," *Dec. Dig. (Key No.)* §§ 88, 92-101; *Cent. Dig.* §§ 136, 139-155.

<sup>54</sup> *Uhler v. Semple*, 20 N. J. Eq. 288. See "*Partnership*," *Dec. Dig. (Key No.)* § 25; *Cent. Dig.* § 11.

<sup>55</sup> *BLOOM v. LOFGREN*, 64 Minn. 1, 65 N. W. 960; *HARLOW v. LA BRUM*, 151 N. Y. 278, 45 N. E. 859; *Densmore Oil Co. v. Densmore*, 64 Pa. 43. See "*Partnership*," *Dec. Dig. (Key No.)* § 25; *Cent. Dig.* § 11.

<sup>56</sup> *Densmore Oil Co. v. Densmore*, supra; *BLOOM v. LOFGREN*, 64 Minn. 1, 65 N. W. 960; *Fawcett v. Whitehouse*, 1 Russ. & M. 132; *Fouse v. Shelly*, 64 W. Va. 425, 63 S. E. 208. See "*Partnership*," *Dec. Dig. (Key No.)* § 25; *Cent. Dig.* § 11.

the firm, with interest,<sup>57</sup> and also the value of his services in attending to the firm business.<sup>58</sup>

*Purchase of Copartner's Interest*

In buying out a copartner, partners are bound to exercise the utmost frankness and honesty, and to make full disclosure of the fair value of the partnership assets.<sup>59</sup> To sustain a purchase by a managing partner from a copartner ignorant of the state of the business, the price must be at least approximately adequate, and all information possessed by him necessary to enable the seller to form a sound judgment must have been communicated.<sup>60</sup> Where certain members of a cigarette manufacturing concern purchased the interest of a copartner, concealing from him the existence of a contract by which the patentee of a cigarette making machine had granted the firm the use of his machines at a much lower rate than was given other manufacturers, thereby greatly increasing the profits of the firm, and knowledge of such contract could not have been acquired by an inspection of the partnership books, it was held that the retiring partner could maintain an action for deceit.<sup>61</sup> The same principles will, of course, apply where one partner seeks to "unload" his interest on another and to withdraw from the firm.

*Same—On Dissolution*

The obligation to perfect fairness and good faith is equally incumbent on persons who have dissolved partner-

<sup>57</sup> HARLOW v. LA BRUM, 151 N. Y. 278, 45 N. E. 859. See "Partnership," Dec. Dig. (Key No.) § 25; Cent. Dig. § 11.

<sup>58</sup> Caplen v. Cox, 42 Tex. Civ. App. 297, 92 S. W. 1048. See, also, chapter X, § 203, p. 589. See "Partnership," Dec. Dig. (Key No.) § 25; Cent. Dig. § 11.

<sup>59</sup> Sexton v. Sexton, 9 Grat. (Va.) 204, 215; Meyers v. Merillion, 118 Cal. 352, 50 Pac. 662; Baker v. Cummings, 4 App. D. C. 230; Pomeroy v. Benton, 57 Mo. 531; Goldsmith v. Koopman, 152 Fed. 173, 81 C. C. A. 465. See "Partnership," Dec. Dig. (Key No.) §§ 95, 226; Cent. Dig. §§ 142, 472.

<sup>60</sup> Brooks v. Martin, 2 Wall. 70, 17 L. Ed. 732; Gilbert & O'Callaghan v. Anderson, 73 N. J. Eq. 243, 66 Atl. 926. See "Partnership," Dec. Dig. (Key No.) §§ 95, 226; Cent. Dig. §§ 142, 472.

<sup>61</sup> Wright v. Duke, 91 Hun, 409, 36 N. Y. Supp. 853. See "Partnership," Dec. Dig. (Key No.) §§ 95, 226; Cent. Dig. §§ 142, 472.

ship, but who have not completely wound up and settled the partnership affairs.<sup>62</sup> Even after the dissolution of a firm, where one partner obtained for himself a renewal of an unexpired firm lease containing no provision for renewal, without the consent of his copartner, he was obliged to account to the latter for the value of the expectancy of the renewal; "for this," said the court, "pertained to the old lease as a firm asset."<sup>63</sup>

### RIGHT TO BENEFITS FROM TRANSACTIONS CONCERNING FIRM INTERESTS

130. A partner will not be permitted to obtain for himself profits or benefits arising from a transaction concerning firm interests or property. Such benefits accrue to all the members of the firm.

In a great measure the rights, functions, and duties of partners comprehend those of both trustees and agents.<sup>64</sup> If, therefore, any benefit is to be gained from transactions regarding firm affairs, it is the partner's duty to obtain it, not for himself, but for the firm.<sup>65</sup> There should be no

<sup>62</sup> *Betts v. June*, 51 N. Y. 274; *Jones v. Dexter*, 130 Mass. 380, 39 Am. Rep. 459; *Beam v. Macomber*, 33 Mich. 127; *Warren v. Schainwald*, 62 Cal. 56; *Lees v. Laforest*, 14 Beav. 250; *Clegg v. Fishwick*, 1 Macn. & G. 294; *Wells v. McGeoch*, 71 Wis. 196, 35 N. W. 769; *Pierce v. McClellan*, 93 Ill. 245. See "*Partnership*," *Dec. Dig. (Key No.)* §§ 277-295; *Cent. Dig.* §§ 624-665.

<sup>63</sup> *Johnson's Appeal*, 115 Pa. 129, 8 Atl. 36, 2 Am. St. Rep. 539. See, also, *MITCHELL v. REED*, 61 N. Y. 123, 19 Am. Rep. 252, *Gilmore, Cas. Partnership*, 419. See "*Partnership*," *Dec. Dig. (Key No.)* §§ 277-295; *Cent. Dig.* §§ 624-665.

<sup>64</sup> *MITCHELL v. REED*, 61 N. Y. 123, 19 Am. Rep. 252, *Gilmore, Cas. Partnership*, 419. See "*Partnership*," *Dec. Dig. (Key No.)* §§ 70-101; *Cent. Dig.* §§ 114-155.

<sup>65</sup> *Kimberly v. Arms*, 129 U. S. 512, 9 Sup. Ct. 355, 32 L. Ed. 764; *Hill v. Miller*, 78 Cal. 149, 20 Pac. 304; *Tebbetts v. Dearborn*, 74 Me. 392; *Filbrun v. Ivers*, 92 Mo. 388, 4 S. W. 674; *Coursin's Appeal*, 79 Pa. 220. See, also, *David Belasco Co. v. Klaw*, 48 Misc. Rep. 597, 97 N. Y. Supp. 712. See "*Partnership*," *Dec. Dig. (Key No.)* §§ 70, 97; *Cent. Dig.* §§ 114, 146-151.

clandestine profits in a partner's dealings with his firm. If he furnished to the partnership, at the then prevailing market price, goods which he had previously obtained at a lower price, he must share his profits with his copartners.<sup>66</sup> But a partner need not account to his firm for a benefit personal to himself, received outside the affairs of the partnership.<sup>67</sup> Similarly, the purchase by one partner of property of any kind in which the partnership is concerned may be regarded as a purchase for the firm, and each copartner will be entitled to his share in it, upon reimbursing the purchasing partner to that extent.<sup>68</sup> Thus, where A. and B. became partners to secure a contract for public work in Mexico, and the authorities, without A.'s knowledge, told B. they would not deal with A., and B. thereupon made a contract with them himself without notifying A., it was decided that B. held such contract for the firm, and that A. was entitled to an injunction to prevent his exclusion from participating in the management of the business.<sup>69</sup> If a partner procures in his own name, and without the consent

<sup>66</sup> *Bentley v. Craven*, 18 Beav. 75. Where partners had agreed that property bought by them to be sold again should be sold to a person named and for a named sum, and one of the partners sold it for a larger sum to a company in which he had an interest, it was held that all the partners should participate in the whole profits. *Dunne v. English*, L. R. 18 Eq. 524. As to secret commission on firm sales or purchases, see, further, *Hodge v. Twitchell*, 33 Minn. 389, 23 N. W. 547; *Newell v. Cochran*, 41 Minn. 374, 43 N. W. 84; *Mattern v. Canavan*, 3 Cal. App. 493, 86 Pac. 618. See, also, *Deaner v. O'Hara*, 36 Colo. 476, 85 Pac. 1123; *Rutan v. Huck*, 30 Utah, 217, 53 Pac. 833. See "Partnership," *Dec. Dig. (Key No.)* §§ 70, 88, 97; *Cent. Dig.* §§ 114, 136, 146-151.

<sup>67</sup> *Moffatt v. Farquharson*, 3 Brown, Ch. 338; *Campbell v. Mullett*, 2 Swanst. 551. See "Partnership," *Dec. Dig. (Key No.)* §§ 92-101; *Cent. Dig.* §§ 139-155.

<sup>68</sup> *Anderson v. Lemon*, 8 N. Y. 236. See "Partnership," *Dec. Dig. (Key No.)* § 96; *Cent. Dig.* § 144.

<sup>69</sup> *Miller v. O'Boyle* (C. C.) 89 Fed. 140. One who agrees with another to organize a railroad company and divide the profits, paying his own expenses, cannot refuse to divide a salary which he secures from subscribers to the corporate stock for continued service after the enterprise is under way. *Leeds v. Townsend*, 223 Ill. 451, 81 N. E. 1069, 13 L. R. A. (N. S.) 191. See "Partnership," *Dec. Dig. (Key No.)* §§ 92-101, 118; *Cent. Dig.* §§ 139-155, 181.

of his associates, a renewal of the lease of the firm premises, he must hold that renewal as firm property.<sup>70</sup> Neither may a partner for his own benefit buy up a claim against his firm, and if he takes an assignment of such a claim he will be considered as holding it for the firm, and may charge against the firm only what he has actually paid out for the claim.<sup>71</sup> Still less may he acquire an adverse title or interest, so as to hold it against the firm.<sup>72</sup> If he buys in the firm property at an execution sale, he does so in trust for the partnership, and a purchaser from him with notice occupies the same position.<sup>73</sup>

The rule requiring benefits acquired clandestinely to inure to the firm rather than to the partner seeking them for his own does not, however, necessarily apply to the case of an acquisition of property or claims by a partner after dissolution of the firm.<sup>74</sup> Where a brother and sister were partners, and the former had been abroad almost continuously, while the latter had regularly carried on the business

<sup>70</sup> *Featherstonhaugh v. Fenwick*, 17 Ves. 298, 311. Where the partnership was to terminate on a certain day, and the lease on the same day, the partner who clandestinely took a lease in his own name was held to be in so far a trustee for the firm. *MITCHELL v. REED*, 61 N. Y. 123, 19 Am. Rep. 252, Gilmore, Cas. Partnership, 419. See, also, *Lidgley*, Part. 307; *Clements v. Norris*, 8 Ch. Div. 129; *Gaddie v. Mann* (C. C.) 147 Fed. 960. See "Partnership," *Dec. Dig. (Key No.)* § 96; *Cent. Dig.* § 144.

<sup>71</sup> *Easton v. Strother*, 57 Iowa, 506, 10 N. W. 877; *Filbrun v. Ivers*, 92 Mo. 388, 4 S. W. 674; *Miller v. Ferguson*, 110 Va. 217, 65 S. E. 562, 28 L. R. A. (N. S.) 618 (1909). See "Partnership," *Dec. Dig. (Key No.)* § 96; *Cent. Dig.* § 144.

<sup>72</sup> *Roby v. Colehour*, 135 Ill. 300, 25 N. E. 777; *Miller v. O'Boyle* (C. C.) 89 Fed. 141; *Kinsman v. Parkhurst*, 18 How. 289, 15 L. Ed. 383. See "Partnership," *Dec. Dig. (Key No.)* § 96; *Cent. Dig.* § 144.

<sup>73</sup> *Roby v. Colehour*, 135 Ill. 300, 25 N. E. 777; *Lamar's Ex'r v. Hale*, 79 Va. 147; *Farmer v. Samuel*, 4 Litt. (Ky.) 187, 14 Am. Dec. 106; *Evans v. Gibson*, 29 Mo. 223, 77 Am. Dec. 565. But see *Bradbury v. Barnes*, 19 Cal. 120 (mining partnership); *McKenzie v. Dickinson*, 43 Cal. 119. See "Partnership," *Dec. Dig. (Key No.)* § 96; *Cent. Dig.* § 144.

<sup>74</sup> *Pierce v. McClellan*, 93 Ill. 245; *Chittenden v. Witbeck*, 50 Mich. 401, 15 N. W. 528; *Payne v. Hornby*, 25 Beav. 280. But see *Spless v. Rosswog*, 63 How. Prac. (N. Y.) 401. See "Partnership," *Dec. Dig. (Key No.)* § 96; *Cent. Dig.* § 144.

alone, later marrying, and continued in the same business, purchasing property for its purposes, such property was held to belong to her solely.<sup>75</sup>

### RIGHT TO BENEFITS FROM INFORMATION OBTAINED AS PARTNER

131. If a partner uses information obtained by him in the course of the transaction of the partnership business for purposes within the scope of the partnership business, or for any purposes which would compete with the partnership business, he must account to the firm for any benefits which he may have derived from such information.<sup>76</sup>

Very often information may be acquired by a partner through his association with the firm that he would like to use for his personal profit. One member of a partnership formed to speculate in real estate may in the course of the partnership business secure knowledge of a profitable deal and attempt to appropriate its benefits all to himself. Clearly this would be a case where his information should be considered the property of the partnership, in the sense that it should properly be applied to purposes within the scope of the partnership business, and for the advancement of all the members.<sup>77</sup> If, however, the business of the firm is limited to real estate brokerage, or the sale and purchase of real estate for the account of others, then the mere fact that one member of the firm applied knowledge gained therein to a successful speculation on his own account would constitute no such violation of his duty to the firm

<sup>75</sup> *Merot v. Burnand*, 4 Auss. 247. See "Partnership," Dec. Dig. (Key No.) § 96; Cent. Dig. § 144.

<sup>76</sup> *Aas v. Benham*, 2 Ch. 244, 255, 65 Law T. (N. S.) 25, 19 Eng. Cas. 589. See "Partnership," Dec. Dig. (Key No.) §§ 81, 92-101; Cent. Dig. §§ 129, 139-155.

<sup>77</sup> *LATTA v. KILBOURN*, 150 U. S. 524, 14 Sup. Ct. 201, 37 L. Ed. 1169, Gilmore, Cas. Partnership, 425. See "Partnership," Dec. Dig. (Key No.) §§ 97-99; Cent. Dig. §§ 146-153.

as to entitle it to a share of his profits.<sup>78</sup> "It is not the source of the information, but the use to which it is applied," says the leading English authority on the subject,<sup>79</sup> "which is of importance in such matters. To hold that a partner can never derive any personal benefit from information which he obtains as a partner would be manifestly absurd. Suppose a partner to become, in the course of carrying on his business, well acquainted with a particular branch of science or trade, and suppose him to write and publish a book on the subject; could the firm claim the profits thereby obtained? Obviously not, unless by publishing the book he in fact competed with the firm in their own line of business."<sup>80</sup> So, also, information concerning a mining district, acquired by a partner while prospecting for his firm, if not fraudulently withheld from the firm, can be used for his sole advantage after the dissolution of the partnership.<sup>81</sup> It is the misapplication of information that may be regarded as firm property to purposes which are competitive, such as the use of information gathered for one newspaper partnership in another publication, that makes the guilty partner liable to account to his firm.<sup>82</sup> But there is no principle or authority which prevents a partner from using information gained as a partner for purposes which are wholly without the firm business.<sup>83</sup>

<sup>78</sup> *Id.*

<sup>79</sup> *Aas v. Benham* (1891) 2 Ch. 244, 255, 65 Law Times (N. S.) 25, 19 Eng. Cas. 589. See "*Partnership*," *Dec. Dig. (Key No.)* §§ 97-99; *Cent. Dig.* §§ 146-153.

<sup>80</sup> *Id.* As to competing business, see post, § 132.

<sup>81</sup> *JENNINGS v. RICKARD*, 10 Colo. 395, 15 Pac. 677, *Gilmore, Cas. Partnership*, 421. See, also, *Burr v. De La Vergne*, 102 N. Y. 415, 7 N. E. 366. See "*Partnership*," *Dec. Dig. (Key No.)* §§ 92-101; *Cent. Dig.* §§ 139-155; "*Mines and Minerals*," *Dec. Dig. (Key No.)* § 99; *Cent. Dig.* § 223.

<sup>82</sup> *Glassington v. Thwaites*, 1 Sim. & St. 124. See "*Partnership*," *Dec. Dig. (Key No.)* §§ 92-101; *Cent. Dig.* §§ 139-155.

<sup>83</sup> *Dean v. MacDowell*, 8 Ch. Div. 345; *Aas v. Benham* (1891) 2 Ch. 244, 65 Law Times (N. S.) 25, 19 Eng. Cas. 589; *LATTA v. KILBOURN*, 150 U. S. 524, 14 Sup. Ct. 201, 37 L. Ed. 1169, *Gilmore, Cas. Partnership*, 425. See "*Partnership*," *Dec. Dig. (Key No.)* §§ 92-101; *Cent. Dig.* §§ 139-155.

## RIGHT TO CARRY ON SEPARATE BUSINESS

132. In the absence of any agreement to the contrary, a partner may carry on a separate business, so long as he does not compete with his firm. Competing with it, he must account to the firm for all the profits made in such separate business, and for all losses suffered by the firm therefrom.

Unless a partner has contracted expressly or impliedly to devote all his energies and time to the partnership business, his mere membership in a firm should not prevent him from engaging in other enterprises not inconsistent with his duty as a partner. Although the business he carries on for his private benefit may be similar to that of the firm, if it is in fact different, he is under no obligation to account for its profits to his associates. A member of a firm of warehousemen does not compete with his partnership in owning and managing wharfboats.<sup>84</sup> It is evident, therefore, that the right to engage in a separate business is no different in principle than the right to use information acquired as a partner for one's own private gain. It is the competition with the firm within the scope of the firm business that is forbidden. A partner stands in a relation of trust and confidence, and must not, in the pursuit of his private advantage, place himself in a position that gives him a bias against the due discharge of that trust or confidence.<sup>85</sup> It is often, however, a difficult question to decide whether the separate business carried on by a partner

<sup>84</sup> *Northrup v. Phillips*, 99 Ill. 449. One of a firm of attorneys is entitled to retain for himself the compensation he receives for acting as executor of an estate. *Metcalfe v. Bradshaw*, 145 Ill. 124, 33 N. E. 1116, 36 Am. St. Rep. 478. A dormant or silent partner, who only lends capital or credit to the firm, may consistently have an antagonistic interest, if there is no deception. *Pierce v. Daniels*, 25 Vt. 624, 634. See "Partnership," *Dec. Dig. (Key No.)* § 99; *Cent. Dig.* § 153.

<sup>85</sup> *BURTON v. WOOKEY*, 6 Madd. 367, 368, *Gilmore, Cas. Partnership*, 418; *Van Deusen v. Crispell*, 114 App. Div. 361, 99 N. Y. Supp. 874. See "Partnership," *Dec. Dig. (Key No.)* § 99; *Cent. Dig.* § 153.

is in fact competitive. The Supreme Court of the United States, in the leading case of *Latta v. Kilbourn*,<sup>88</sup> has held that a partner in a firm of real estate brokers does not interfere with its business by engaging in the purchase of real estate as an individual speculation. This question of fact once decided, the principle of law is easily applicable.<sup>87</sup> Beyond the line of trade or business in which the firm is engaged, there is no restraint upon the right of a partner to traffic for his own benefit, in the absence of express agreement on the subject.<sup>88</sup>

It should be noted, in addition, that the right of the partners to claim a share in the clandestine profits of a copartner's competitive business can be asserted by them alone, and is not otherwise available to third persons for the purpose of fixing a liability upon the partnership.<sup>89</sup> While the partner engaging in another business not competitive with the firm business is not liable to account for profits made in such separate business, he may be liable to his copartners for any damages caused by the breach of his agreement to devote his entire time and energy to the firm business.<sup>90</sup>

## RIGHT TO COMPENSATION FOR SERVICES

133. A partner's services in the transaction of the firm business do not entitle him to compensation, unless there has been a special agreement to that effect, or unless unreasonable burdens have been cast upon him by his copartner's willful neglect of his duties.

<sup>88</sup> *LATTA v. KILBOURN*, 150 U. S. 524, 14 Sup. Ct. 201, 37 L. Ed. 1169, Gilmore, Cas. Partnership, 425. See "*Partnership*," Dec. Dig. (Key No.) § 99; Cent. Dig. § 153.

<sup>87</sup> *Tichenor v. Newman*, 186 Ill. 264, 57 N. E. 828. See "*Partnership*," Dec. Dig. (Key No.) § 99; Cent. Dig. § 153.

<sup>88</sup> *Metcalfe v. Bradshaw*, 145 Ill. 124, 33 N. E. 1116, 36 Am. St. Rep. 478. See "*Partnership*," Dec. Dig. (Key No.) § 99; Cent. Dig. § 153.

<sup>89</sup> *Lockwood v. Beckwith*, 6 Mich. 168, 72 Am. Dec. 69. See "*Partnership*," Dec. Dig. (Key No.) § 99; Cent. Dig. § 153.

<sup>90</sup> *LATTA v. KILBOURN*, 150 U. S. 524, 14 Sup. Ct. 201, 37 L. Ed. 1169, Gilmore, Cas. Partnership, 425. See "*Partnership*," Dec. Dig. (Key No.) § 99; Cent. Dig. § 153.

Since the law implies, from the very relation of partnership, that each member should devote his entire time and energies to partnership affairs, with no further selfish thought than of his share of the common profits, it follows that, if he is to exact payment from the firm for services by him on its behalf, there must be a special agreement to that effect.<sup>91</sup> The mere fact that one partner has been more active than the others in promoting their mutual welfare is not enough to justify a claim for additional compensation on his part. It is easy enough to provide for such a contingency in the agreement itself, if it is intended. If no such stipulation is made, the law will not imply one.<sup>92</sup> While the rule may seem to impose considerable hardship upon the partner who is forced to assume more work than he had anticipated, it is clear that, should the courts undertake, upon a mere estimate of a partner's services, to award compensation in one case, they must do so in all cases where skill and labor are unequally bestowed. This would be to abolish the rule of law, and to place the right to compensation not upon contract, where it belongs, but upon the principles of quantum meruit.<sup>93</sup> The force of the rule is particularly shown in the denial of extra compensation to a partner upon whose shoulders a disproportionate amount of work is thrown by the illness of a copartner;

<sup>91</sup> *Williams v. Pedersen et al.*, 47 Wash. 472, 92 Pac. 287, 17 L. R. A. (N. S.) 384; *Denver v. Roane*, 99 U. S. 355, 25 L. Ed. 476; *Nevills v. Moore Min. Co.*, 135 Cal. 561, 67 Pac. 1054; *Drew v. Ferson*, 22 Wis. 651; *Glover v. Hembree*, 82 Ala. 324, 8 South. 251; *Emerson v. Durand*, 64 Wis. 111, 24 N. W. 129, 54 Am. Rep. 593; *Roth v. Boles*, 139 Iowa, 253, 115 N. W. 930. For compilation of cases, see note in 17 L. R. A. (N. S.) 384-419. See "*Partnership*," *Dec. Dig. (Key No.)* § 83; *Cent. Dig.* § 131.

<sup>92</sup> *LINDSEY v. STRANAHAN*, 129 Pa. 635, 18 Atl. 524, *Gilmore, Cas. Partnership*, 435; *Dunlap v. Watson*, 124 Mass. 305; *Peck v. Alexander*, 40 Colo. 392, 91 Pac. 38 (1907); *Caldwell v. Lang*, 101 S. W. 972, 31 Ky. Law Rep. 237. See "*Partnership*," *Dec. Dig. (Key No.)* § 83; *Cent. Dig.* § 131.

<sup>93</sup> *Caldwell v. Leiber*, 7 Paige (N. Y.) 483; *Roth v. Boles*, 139 Iowa, 253, 115 N. W. 930; *Williams v. Pedersen*, 47 Wash. 472, 92 Pac. 287. See annotated note to this case in 17 L. R. A. (N. S.) 385. See "*Partnership*," *Dec. Dig. (Key No.)* § 83; *Cent. Dig.* § 131.

such illness being held to be a risk that should have been foreseen.<sup>94</sup>

An exception to the general rule is recognized where the difference in extent or importance of the services actually rendered by the various partners was clearly not contemplated by them when they entered into the partnership relation. Thus, where one partner willfully violates his duty as partner by neglecting the business, leaving it altogether to the care of his copartner, the latter was held entitled to credit for his services in addition to his share of the profits.<sup>95</sup>

Ordinarily the general rule, denying extra compensation in the absence of special agreement, applies also to liquidating and surviving partners.<sup>96</sup> The tendency of the cases is, however, to allow extra compensation to surviving partners under special circumstances, wherever it is possible to construe the same as extraordinary.<sup>97</sup>

<sup>94</sup> *Heath v. Waters*, 40 Mich. 457. But see *Hart v. Myers* (Sup.) 12 N. Y. Supp. 140, affirmed 59 Hun, 420, 13 N. Y. Supp. 388, where there was an express covenant on the sick partner's part to perform a certain part of the duties of the firm. For further examples of express provision for compensation, see *Kelley v. Turner*, 81 Md. 269, 31 Atl. 700; *Smith v. Knight*, 88 Iowa, 257, 55 N. W. 189; *Eckert v. Clark*, 14 Misc. Rep. 18, 35 N. Y. Supp. 118. A promise to pay for extra services will not be implied from the mere rendition of such services, no matter how great the excess of services may be. *Burgess v. Badger*, 124 Ill. 288, 14 N. E. 850; *McAllister v. Payne*, 108 Ga. 517, 34 S. E. 165. See "*Partnership*," *Dec. Dig. (Key No.)* § 83; *Cent. Dig.* § 131.

<sup>95</sup> *Denver v. Roane*, 99 U. S. 355, 25 L. Ed. 476; *Marsh's Appeal*, 69 Pa. 30, 8 Am. Rep. 206; *Airy v. Borham*, 29 Beav. 620; *MATTINGLY v. STONE'S ADM'R*, 35 S. W. 921, 18 Ky. Law Rep. 187; *Miller v. Hale*, 96 Mo. App. 427, 70 S. W. 258. See "*Partnership*," *Dec. Dig. (Key No.)* §§ 83, 86; *Cent. Dig.* §§ 131, 134.

<sup>96</sup> *Beatty v. Wray*, 19 Pa. 516, 57 Am. Dec. 677; *Brown v. McFarland's Ex'r*, 41 Pa. 129, 80 Am. Dec. 598; *GYGER'S APPEAL*, 62 Pa. 73, 1 Am. Rep. 382; *Kimball v. Lincoln*, 5 Ill. App. 316, affirmed 99 Ill. 578; *Slater v. Slater*, 78 App. Div. 449, 80 N. Y. Supp. 363; *Id.*, 175 N. Y. 143, 67 N. E. 224, 61 L. R. A. 796, 96 Am. St. Rep. 605. Contra, *Royster v. Johnson*, 73 N. C. 474. See, also, ante, chapter V, § 122, p. 353, *Surviving Partner*. See "*Partnership*," *Dec. Dig. (Key No.)* §§ 253, 307; *Cent. Dig.* §§ 550, 710, 711.

<sup>97</sup> *THAYER v. BADGER*, 171 Mass. 279, 50 N. E. 541, *Gilmore, Cas. Partnership*, 435; *Zell's Appeal*, 126 Pa. 329, 17 Atl. 647; *Rob-*

## RIGHT TO INDEMNITY AND CONTRIBUTION

134. A partner is entitled to indemnity for losses caused by his copartner's violation of the partnership contract. In addition, if he pays or is compelled to bear more than his just share of the firm's debts or liabilities, or incurs a personal liability or loss in the ordinary and proper conduct of the firm business, or in doing something necessary for the preservation of the business or property of the firm, he is entitled to demand that his copartners should, for his relief, contribute their due proportion of his outlay or loss on the firm's behalf.

### *Indemnity*

The right and duty of indemnity is a natural consequence of the duty to conform to the partnership agreement. For all losses due to failure to conform to the partnership agreement, or to lack of skill and diligence, the partner in fault must indemnify the copartners. For example, where a partner, in violation of an express agreement not to extend credit to relatives, advances money from the partnership funds or sells partnership goods to an impecunious relative, he is personally liable for the account.<sup>98</sup>

*Inson v. Simmons*, 146 Mass. 167, 15 N. E. 558, 4 Am. St. Rep. 299; *Hite's Heirs v. Hite's Ex'rs*, 1 B. Mon. (Ky.) 177. As to survivor of law partnership, see *Osment v. McElrath*, 68 Cal. 466, 9 Pac. 731, 58 Am. Rep. 17; dictum citing this as possible exception, *Lamb v. Wilsin*, 3 Neb. (Unof.) 496, 92 N. W. 167; *Little v. Caldwell*, 101 Cal. 553, 36 Pac. 107, 40 Am. St. Rep. 89; *Sterne v. Goep*, 20 Hun (N. Y.) 396. See "*Partnership*," *Dec. Dig. (Key No.)* §§ 253, 307; *Cent. Dig.* §§ 550, 710, 711.

<sup>98</sup> *McCoy v. Cossfield*, 54 Or. 591, 104 Pac. 423. See, also, *Holden v. Thurber* (R. I., 1909) 72 Atl. 720; *Brown v. Orr* (1900) 110 Va. 1, 65 S. E. 499; *Loy v. Alston*, 172 Fed. 90, 96 C. C. A. 578; *MURPHY v. CRAFTS*, 13 La. Ann. 519, 71 Am. Dec. 519, *Gilmore, Cas. Partnership*, 438; *CHARLTON v. SLOAN*, 76 Iowa, 288, 41 N. W. 303, *Gilmore, Cas. Partnership*, 439; *YORKS v. TOZER*, 59 Minn. 78, 60 N. W. 846, 28 L. R. A. 86, 50 Am. St. Rep. 395, *Gilmore, Cas. Partnership*, 440. See ante, chapter VI, § 123, *Duty to Conform to Agreement*, and § 128, *Duty to Exercise Care and Skill*. See "*Partnership*," *Dec. Dig. (Key No.)* § 85; *Cent. Dig.* § 153.

### *Contribution*

The right and duty of contribution, while similar, is more peculiar to the law of partnership. In all partnership transactions there is common risk and common liability. The members undertake joint enterprises, assume joint risks, and they incur in all cases joint liabilities.<sup>99</sup> Each partner is bound for the entire amount due on the copartnership contracts. If, then, he is forced to pay alone an obligation which properly should be borne by all the parties, it is but right that he should be reimbursed for the amount he has expended beyond his own pro rata liability.<sup>1</sup> The right to contribution, while often expressly recognized in the articles of partnership, exists irrespective of them as an incident of the partnership relation. Prima facie all losses or expenditures of the character above indicated are to be borne by the partners equally.<sup>2</sup>

### *Same—Basis of the Right*

The right of contribution in the cases above cited resembles indemnity in being nothing more than a partner's due as agent for the firm.<sup>3</sup> Where, however, the expense incurred by the partner for which he seeks reimbursement

<sup>99</sup> MASON v. ELDRED, 6 Wall. 231, 18 L. Ed. 783, Gilmore, Cas. Partnership, 281. See "Partnership," Dec. Dig. (Key No.) § 101; Cent. Dig. § 155.

<sup>1</sup> Moran Bros. Co. v. Watson (1906) 44 Wash. 392, 87 Pac. 508. The firm is liable for the expense of repairs on a partnership vessel, paid by one partner during the voyage. Mumford v. Nicoll, 20 Johns. (N. Y.) 611. A partner is allowed all his personal expenses while away from home on firm business, although the partnership contract binds each partner to pay his own individual expenses; that contract provision being construed to apply only to expenses when the parties were at home. Withers v. Withers, 8 Pet. 355, 8 L. Ed. 972. Cf. French v. Vanatta (1907) 83 Ark. 306, 104 S. W. 141. See "Partnership," Dec. Dig. (Key No.) § 101; Cent. Dig. § 155.

<sup>2</sup> Moley v. Brine, 120 Mass. 324; Jones v. Butler, 87 N. Y. 613; TAFT v. SCHWAMB, 80 Ill. 289; Richards v. Grinnell, 63 Iowa, 44, 18 N. W. 668, 50 Am. Rep. 727; Knapp v. Edwards, 57 Wis. 191, 15 N. W. 140. See "Partnership," Dec. Dig. (Key No.) §§ 84, 87, 101; Cent. Dig. §§ 132, 135, 155.

<sup>3</sup> Thomas v. Atherton, 10 Ch. Div. 185; Spottiswoode's Case, 6 De Gex, M. & G. 345; Robinson's Ex'rs' Case, 1d. 572; Lefroy v. Gore, 1 Jones & L. 571; Bury v. Allen, 1 Colly. 604. See "Partnership," Dec. Dig. (Key No.) §§ 85, 101; Cent. Dig. §§ 133, 155.

has been an "extraordinary outlay for necessary purposes," for example, to pay the cost of operations without which the business cannot go on, there is some difference of opinion as to the proper origin of the principle of contribution. Pollock<sup>4</sup> maintains that the duty of contribution in this class of cases has nothing to do with either agency or trust; that it is a duty imposed, if at all, by quasi contract, a duty to be recognized only under special circumstances, and more analogous to salvage and average than aught else. The English cases, however, hardly sustain this, clearly basing the partner's right to be protected by contribution against extraordinary losses upon the implied authority of the partner to make the expenditures. "A partnership creates an agreement that, in case any partner pays more than his share, the others shall indemnify him."<sup>5</sup> But the right to contribution is not necessarily limited by the scope of a partner's powers in dealing with third parties. For example, while a partner might not have any express or implied authority to borrow money and thereby subject his co-partners to liability to repay it, he may be entitled to reimbursement for money necessarily laid out by him for the firm.<sup>6</sup> In the United States the right to indemnity or contribution has never been seriously questioned; the courts recognizing its existence, irrespective of whether based on the rules of agency,<sup>7</sup> trust,<sup>8</sup> or implied authority.<sup>9</sup>

*Same—Modified by Agreement*

It may always be shown that there has been a tacit or express agreement that there should be no contribution.<sup>10</sup>

<sup>4</sup> Digest Part. (8th Ed.) 82.

<sup>5</sup> Wright v. Hunter, 5 Ves. 792. See "*Partnership*," Dec. Dig. (Key No.) §§ 84, 87, 101; Cent. Dig. §§ 132, 135, 155.

<sup>6</sup> Ex parte Chippendale, In re German Mining Co., 4 De G., M. & G. 19. See "*Partnership*," Dec. Dig. (Key No.) §§ 84, 87, 101; Cent. Dig. §§ 132, 135, 155.

<sup>7</sup> Meserve v. Andrews, 106 Mass. 419. See "*Partnership*," Dec. Dig. (Key No.) §§ 85, 101; Cent. Dig. §§ 133, 155.

<sup>8</sup> Lee's Ex'r v. Dolan's Adm'r, 39 N. J. Eq. 193. See "*Partnership*," Dec. Dig. (Key No.) §§ 85, 101; Cent. Dig. §§ 133, 155.

<sup>9</sup> Chancellor Kent, in Sells' Adm'r v. Hubbell, 2 Johns. Ch. (N. Y.) 894, 307. See "*Partnership*," Dec. Dig. (Key No.) §§ 85, 101; Cent. Dig. §§ 133, 155.

<sup>10</sup> Lyman v. Lyman, 15 Fed. Cas. No. 8,628, 2 Paine, 11; Mallett

Agreement also may fix a limit as to the amount of contribution; but, in the absence of such an agreement, the amount which a partner may be called on to contribute is not necessarily limited to a sum proportionate to his share in the partnership. For, if some of the partners are unable to contribute their share, those who are solvent must contribute the whole.<sup>11</sup>

*Same—Conditions for Obtaining Contribution—Losses Due to Partner's Own Negligence*

In order that a partner be allowed credit for expenditures made by him, however, it is not enough that he deemed them necessary and proper. It must further appear that they related to the common undertaking, and were in some way beneficial to the partnership.<sup>12</sup> If the loss or outlay for which a partner seeks indemnity or contribution was caused only through his own negligence, bad faith, or breach of duty, or while he was acting outside of his authority, no duty to reimburse him arises.<sup>13</sup> Still less does

*v. Kellar*, 181 N. Y. 543, 73 N. E. 1126, affirmed 91 App. Div. 502, 86 N. Y. Supp. 917; *Boskowitz v. Nickel*, 97 Cal. 19, 31 Pac. 732. See "*Partnership*," *Dec. Dig. (Key No.)* §§ 84, 87, 101; *Cent. Dig.* §§ 132, 135, 155.

<sup>11</sup> *MAGILTON v. STEVENSON et al.*, 173 Pa. 560, 34 Atl. 235, *Gilmore, Cas. Partnership*, 445; *Scudder v. Ames*, 89 Mo. 496, 14 S. W. 525; *McKewan's Case*, 6 Ch. Div. 447; *In re Worcester Corn Exchange Co.*, 3 De Gex, M. & G. 180. Cf. *Meadows v. Mocquot*, 110 Ky. 220, 61 S. W. 28, 22 Ky. Law Rep. 1646, to the effect that one who is to contribute labor as his share of the partnership capital, cannot be compelled to contribute to losses of capital by the other partner. Cf. *Hebblethwaite v. Flint*, 115 App. Div. 597, 101 N. Y. Supp. 43. See "*Partnership*," *Dec. Dig. (Key No.)* §§ 84, 87, 101; *Cent. Dig.* §§ 132, 135, 155.

<sup>12</sup> *Van Tine v. Hilands (C. C.)* 142 Fed. 613; *Godfrey v. White*, 43 Mich. 171, 5 N. W. 243; *Meserve v. Andrews*, 106 Mass. 419. See, also, *Butler v. Butler*, 164 Ill. 171, 45 N. E. 426; *Erben v. Heston*, 202 Pa. 406, 51 Atl. 1025. A payment by one partner of money in excess of his share of the capital, not derived from partnership profits, when it was necessary to be paid to preserve the partnership business, constitutes a preferred claim on the partnership property, which must be paid before there can be any surplus found to be divided among partners. *Matthews v. Adams*, 84 Md. 143, 35 Atl. 60. See "*Partnership*," *Dec. Dig. (Key No.)* §§ 84, 87, 101; *Cent. Dig.* §§ 132, 135, 155.

<sup>13</sup> *McFadden v. Leeka*, 48 Ohio St. 513, 23 N. E. 874; *Ball v.*

the right to contribution exist in favor of a partner who has, by his own fraud or misrepresentations, enticed another into the firm; for the latter is in a position to withdraw from the partnership agreement without liability for losses.<sup>14</sup>

*Same—Illegal Transactions*

With regard to the right of a partner to reimbursement whose loss has occurred through an illegal act, it should be said at the outset that by a familiar rule there is no contribution between wrongdoers. The courts, however, are so liberal in this respect that unless the partnership itself is illegal, or unless the act relied on as the basis of the claim is not only illegal, but has been committed by the partner seeking contribution, either expressly or impliedly knowing its illegality, contribution will be allowed.<sup>15</sup> A partner is entitled to contribution where the act which causes him loss was a mere breach of trust as distinguished from an illegal act, or not so clearly illegal but what it may have been done in good faith or honest ignorance.<sup>16</sup>

*Same—Obtainable Only on Settlement of Partnership Accounts*

Contribution proceeds upon the supposition that the partner has paid more than his share of a burden which was common to all the partners. To ascertain whether he has really paid more than his share, an accounting of the firm business is essential. This usually involves a suit in equity, for the machinery of a court of law is not adequate to deal with details of a partnership accounting. Until there has

Levin, 48 La. Ann. 359, 19 South. 118; Warren v. Raben, 33 Neb. 380, 50 N. W. 257; Maher v. Bull, 44 Ill. 97. See "Partnership," Dec. Dig. (Key No.) §§ 84, 85, 87, 101; Cent. Dig. §§ 132, 133, 135, 155.

<sup>14</sup> Rawlins v. Wickham, 1 Giff. 355; Newbigging v. Adam, 34 Ch. Div. 582; Pillans v. Harkness, Colles, 442. See "Partnership," Dec. Dig. (Key No.) §§ 84, 85, 87, 88, 101; Cent. Dig. §§ 132, 133, 135, 136, 155.

<sup>15</sup> Lindl. Part. p. 378; Betts v. Gibbins, 2 Adol. & E. 57; Smith v. Ayrault, 71 Mich. 475, 39 N. W. 724, 1 L. R. A. 311; CLAYTON v. DAVETT (N. J. Ch.) 38 Atl. 308. See "Partnership," Dec. Dig. (Key No.) §§ 88, 101; Cent. Dig. §§ 136, 155.

<sup>16</sup> Ashurst v. Mason, L. R. 20 Eq. 225; Pollock, Torts, 170, 171. See "Partnership," Dec. Dig. (Key No.) § 101; Cent. Dig. § 155.

been a settlement of the firm affairs, it is not possible to know definitely the relief to which the complaining partner is entitled.<sup>17</sup> " \* \* \* How can there by any fair or just contribution, or any claim to contribution, as between partners, until after a final settlement and ascertainment of the exact state of the account of each partner, and a full settlement of the partnership affairs? \* \* \* It might well be that appellant was entitled to recover nothing from his copartners by way of contribution on account of what he had paid; for, as there is no pretense that the partnership accounts have ever been settled, it might appear on such settlement that appellant was still indebted to the partnership in a large sum, and that his partner had actually paid for it much more than he had done."<sup>18</sup> Moreover, the right on contribution should arise only when loss has been actually sustained by the person seeking relief;<sup>19</sup> but it has been held that a prospect of immediate loss may justify an immediate suit in equity.<sup>20</sup>

### RIGHT TO AN ACCOUNTING

**135.** Each partner is entitled to a complete accounting from his copartner, showing the condition of the partnership affairs, in order that the respective rights and liabilities of the partners in relation to their common business may be known. If such an accounting is refused, any partner aggrieved may bring suit in equity to compel it.

<sup>17</sup> *Kennedy v. McFadon*, 3 Har. & J. (Md.) 194, 5 Am. Dec. 434; *Maxwell v. Jameson*, 2 Barn. & Ald. 51; *Spark v. Heslop*, 1 El. & El. 563. See "*Partnership*," Dec. Dig. (Key No.) § 109; Cent. Dig. § 171.

<sup>18</sup> *WARRING v. ARTHUR et al.*, 98 Ky. 34, 32 S. W. 221, Gilmore, Cas. Partnership, 441. See "*Partnership*," Dec. Dig. (Key No.) § 109; Cent. Dig. § 171.

<sup>19</sup> *Maxwell v. Jameson*, 2 Barn. & Ald. 51; *Spark v. Heslop*, 1 El. & El. 563. See "*Partnership*," Dec. Dig. (Key No.) §§ 101, 109; Cent. Dig. §§ 155, 171.

<sup>20</sup> *Lacey v. Hill*, L. R. 18 Eq. 182; *Hobbs v. Wayet*, 36 Ch. Div. 256. See "*Partnership*," Dec. Dig. (Key No.) § 109; Cent. Dig. § 171.

*Basis and Purpose of Accounting*

We have seen that it is the duty of each partner to keep and furnish correct accounts of all things affecting the partnership.<sup>21</sup> The importance of this duty becomes manifest when upon the termination of the partnership, or upon the happening of some other event requiring an adjustment of the assets and liabilities of the firm, a formal accounting is necessary.<sup>22</sup> We have also seen that a formal settlement of the mutual rights of the several partners in the firm property is necessary before an action for contribution can be maintained by one partner against the other.<sup>23</sup> If all the partners can agree, and there are no conflicting claims, and no frauds on creditors, there is nothing to prevent the partners themselves making a complete settlement of all the firm affairs in a private accounting without resort to the courts.<sup>24</sup> In the absence of fraud or mutual mistake, these private accountings and settlements will be conclusive upon the partners.<sup>25</sup> Very frequently, however, disputes, insolvency, or the existence of conflicting claims preclude an amicable settlement of their affairs by the partners themselves. It then becomes necessary to seek the aid of the courts. The right of the partners to enforce an accounting in the courts is considered at length in chapter

<sup>21</sup> *Supra*, § 127, p. 371.

<sup>22</sup> *Reis v. Reis*, 99 Minn. 446, 109 N. W. 997; *Miller & Co. v. Simpson*, 107 Va. 476, 59 S. E. 378 (1907); *Hines v. Dean*, 1 White & W. Civ. Cas. Ct. App. (Tex.) § 690; *Sprout v. Crowley*, 30 Wis. 187. See "*Partnership*," *Dec. Dig. (Key No.)* §§ 81, 297-312; *Cent. Dig.* §§ 129, 679-728.

<sup>23</sup> *Supra*, § 134, p. 387.

<sup>24</sup> *Scheuer v. Berringer*, 102 Ala. 216, 14 South. 640; *Sage v. Woodin*, 66 N. Y. 578; *Kimberly v. Arms*, 129 U. S. 512, 9 Sup. Ct. 355, 32 L. Ed. 764; *Smith v. Proskey*, 177 N. Y. 526, 69 N. E. 1131, revising 82 App. Div. 19, 81 N. Y. Supp. 424; *Phillips v. Reynolds*, 236 Ill. 119, 86 N. E. 193 (1908). See "*Partnership*," *Dec. Dig. (Key No.)* §§ 81, 311; *Cent. Dig.* §§ 129, 718-725.

<sup>25</sup> *Howard v. Pratt*, 110 Iowa, 533, 81 N. W. 722; *Eddy v. Fogg*, 192 Mass. 543, 78 N. E. 549; *Corner v. Mackey*, 147 N. Y. 574, 42 N. E. 29; *Heath v. Van Cott*, 9 Wis. 516; *Winslow v. Leland*, 128 Ill. 304, 21 N. E. 588; *Fritz v. Fritz* (1908) 141 Iowa, 721, 118 N. W. 769. See "*Partnership*," *Dec. Dig. (Key No.)* §§ 81, 311; *Cent. Dig.* §§ 129, 718-725.

VIII, where the general subject of actions between partners is discussed.<sup>26</sup>

### DISTRIBUTION OF ASSETS AMONG PARTNERS

136. Unless otherwise provided by the partnership agreement, the assets of a partnership are distributed as follows:

- (a) To the payment of all debts and liabilities of the firm to third parties.
- (b) The repayment to each partner of his advances to the firm.
- (c) The return to each partner of his contribution to the capital of the firm.
- (d) The surplus, if any, is divided among the partners in the proportion provided in the partnership agreement.

Having noted the right to an accounting and the property subject to it, it becomes material to know how that accounting is to apportion the rights of those both within and without the firm, so as to give to each his due share of the partnership property. In a previous chapter<sup>27</sup> the application of partnership property to partnership debts, and the paramount rights of the latter, were fully described. For the purpose of this discussion, it is necessary, therefore, only to repeat that in the accounting the debts of the partnership are first to be paid, and that neither the claims of the individual partners against the firm nor their claims against each other should be allowed to compete with these.<sup>28</sup>

<sup>26</sup> See chapter VIII, p. 459. Actions Between Partners.

<sup>27</sup> Chapter III, § 58, p. 179.

<sup>28</sup> GROTH et al. v. KERSTING et al., 23 Colo. 213, 47 Pac. 393, Gilmore, Cas. Partnership, 484; Jarvis v. Brooks, 27 N. H. 37, 59 Am. Dec. 359; Edison Electric Illuminating Co. v. De Mott, 51 N. J. Eq. 16, 25 Atl. 952; Forsyth v. Woods, 11 Wall. 484, 20 L. Ed. 207; Second Nat. Bank of Oswego v. Burt, 93 N. Y. 233; Powell v. Bennett, 131 Ind. 465, 30 N. E. 518; Blake v. Third National Bank of St. Louis (1909) 219 Mo. 644, 118 S. W. 641; Lacey v. Cow-

*Repaying Advances*

After the obligations to third parties have been satisfied, the question is one between the partners themselves. Very often one partner has loaned money to the firm over and above his contribution to its capital. This loan is called an advance, and is treated as a debt due from the firm to the partner making it. Next after the firm debts to outsiders all advances are to be paid in full.<sup>29</sup> Suppose, for instance, after paying its debts, a firm of three equal partners should have left \$15,000, and one of the partners had previously advanced to the firm \$7,500. Obviously, if each partner should take out \$5,000, leaving the partner who made the advances a judgment merely against his copartners for two-thirds of the \$7,500, he would not only lose one-third of his advances, but also have thrown upon him the risk of collecting his judgment.<sup>30</sup>

It may turn out, however, that the firm assets left after paying outside creditors are insufficient to pay advances. In this event, unless the partnership agreement provides a different method of apportioning losses, the deficiency is to be borne in the proportion in which the profits are to be shared.<sup>31</sup> The partner to whom the advance is owing must bear his share of the loss like the rest.<sup>32</sup> It is entirely possible, however, to protect the partner making advances by

an (1909) 162 Ala. 546, 50 South. 281. See "*Partnership*," *Dec. Dig.* (Key No.) §§ 176-189; *Cent. Dig.* §§ 303-348.

<sup>29</sup> *Whitney v. Whitney*, 115 Ky. 552, 74 S. W. 194; *Mason v. Gibson*, 73 N. H. 190, 60 Atl. 96; *LESERMAN v. BERNHEIMER*, 113 N. Y. 39, 20 N. E. 869; *Henderson v. Ries*, 108 Fed. 709, 47 C. C. A. 625; *Harman v. Stuart* (Ky., 1909) 119 S. W. 210; *Capital Food Co. v. Globe Coal Co.* (Iowa, 1909), 118 N. W. 803, and 142 Iowa, 134, 120 N. W. 704. See "*Partnership*," *Dec. Dig.* (Key No.) § 304; *Cent. Dig.* §§ 701, 702.

<sup>30</sup> *LESERMAN v. BERNHEIMER*, 113 N. Y. 39, 20 N. E. 869. See "*Partnership*," *Dec. Dig.* (Key No.) § 304; *Cent. Dig.* §§ 701, 702.

<sup>31</sup> Post, note 44, p. 399. See, also, *Ramsay v. Meade*, 37 Colo. 465, 86 Pac. 1018; *Stark v. Howcott*, 118 La. 489, 43 South. 61. See "*Partnership*," *Dec. Dig.* (Key No.) § 304; *Cent. Dig.* §§ 701, 702.

<sup>32</sup> *RAYMOND v. PUTNAM*, 44 N. H. 160, Gilmore, Cas. Partnership, 490. See "*Partnership*," *Dec. Dig.* (Key No.) §§ 303, 304; *Cent. Dig.* §§ 700-702.

an agreement limiting his loss in any event to a certain amount. In this case, should his advances to the firm exceed this amount, and the business prove a failure, he should have a joint and several judgment against his co-partners for the difference.<sup>33</sup>

*Same—Interest on Advances*

There is some conflict in the authorities as to whether a partner should be allowed interest on these advances. That the partnership may be liable for interest, where there is a special contract to that effect, or where it may be implied from the facts and circumstances that the firm is to pay interest on advances, all are agreed.<sup>34</sup> In the absence of such agreement or implication, what is perhaps the weight of authority contends that advances, like overdrafts, are isolated acts, not constituting items in the account between the lending partners and the firm, and that, it being impossible to determine, until after an accounting, whether the partner is really a debtor or a creditor, interest should not be allowed.<sup>35</sup> On the other hand, some courts hold that advances are loans, like any others, and, being usually made with the knowledge of the other partners, should have interest at the statutory or customary rate.<sup>36</sup>

<sup>33</sup> *MAGILTON v. STEVENSON*, 173 Pa. 560, 34 Atl. 235, Gilmore, Cas. Partnership, 445. See "*Partnership*," Dec. Dig. (Key No.) § 87; Cent. Dig. § 135.

<sup>34</sup> *Prentice v. Elliott*, 72 Ga. 154; *McCall v. Moss*, 112 Ill. 493; *Emerson v. Durand*, 64 Wis. 111, 24 N. W. 129, 54 Am. Rep. 593. See "*Partnership*," Dec. Dig. (Key No.) § 75; Cent. Dig. §§ 120-123.

<sup>35</sup> *Miller v. Lord*, 11 Pick. (Mass.) 11; *Godfrey v. White*, 43 Mich. 171, 5 N. W. 243; *Prentice v. Elliott*, 72 Ga. 154; *In re James*, 146 N. Y. 78, 40 N. E. 876, 48 Am. St. Rep. 774. "There is no point during this whole period [of accounting] that can be fixed equitably as the time when interest should be charged. \* \* \* We announce as our conclusion on this subject that the general doctrine is well settled that interest in an accounting between partners is not allowed. The exception is that a court of equity may allow interest where, in view of the particular facts of a case, it is just and equitable to make the allowance." *LAMB v. ROWAN* (1903) 83 Miss. 45, 35 South. 427, 690, Gilmore, Cas. Partnership, 497. See, also, *Lemba v. Blanding* (1909) 139 Wis. 156, 120 N. W. 842. See "*Partnership*," Dec. Dig. (Key No.) § 75; Cent. Dig. §§ 120-123.

<sup>36</sup> *FOLSOM v. MARLETTE*, 23 Nev. 459, 49 Pac. 39, Gilmore,

*Repaying Capital*

After the firm creditors, including partners who have loaned the firm money, are satisfied, the capital of the firm is to be repaid. Ordinarily the capital furnished by the partners is, in the absence of agreement to the contrary, a debt owing by the firm to the contributing partner.<sup>37</sup> If there is not sufficient to repay each partner his capital, then the balances of capitals remaining unpaid must be treated as so many losses, and are to be met like all other debts of the partnership; that is, borne pro rata by the partners in the proportion in which profits are to be shared.<sup>38</sup> That one partner has contributed all the capital makes no difference. If A. contributes the whole partnership capital of \$1,000, and the firm assets on accounting prove to be \$1,500, naturally this \$500 should be divided. Should the assets prove only \$900, A. should be ratably repaid his proportion of this \$100 loss.<sup>39</sup>

Such is the usual situation with regard to capital in the ordinary mercantile partnership; but it may obviously be changed by agreement, as where the partnership articles provide that contributions by the partners to the firm stock shall not be considered as capital, but as firm assets, to be distributed upon settlement, like profits.<sup>40</sup> It may be, es-

Cas. Partnership, 486, and cases cited at page 487. See, also, *Rodgers v. Clement*, 162 N. Y. 422, 56 N. E. 901, 76 Am. St. Rep. 342. By the English Partnership Act, 1890, § 24 (3), interest is allowed on advances. See "*Partnership*," *Dec. Dig. (Key No.)* § 75; *Cent. Dig.* §§ 120-123.

<sup>37</sup> *GROTH v. KERSTING*, 23 Colo. 213, 47 Pac. 393, *Gilmore, Cas. Partnership*, 484; *Scutt v. Robertson*, 127 Ill. 135, 19 N. E. 851; *Jones v. Butler*, 87 N. Y. 613. See "*Partnership*," *Dec. Dig. (Key No.)* § 304; *Cent. Dig.* § 702.

<sup>38</sup> *WHITCOMB v. CONVERSE*, 119 Mass. 88, 20 Am. Rep. 811, *Gilmore, Cas. Partnership*, 488; *TAFT v. SCHWAMB*, 80 Ill. 289; *Newell v. Newell*, L. R. 7 Eq. 538. See "*Partnership*," *Dec. Dig. (Key No.)* § 304; *Cent. Dig.* § 702.

<sup>39</sup> *Newell v. Newell*, *supra*; *Hasbrinck v. Childs*, 3 Bosw. (N. Y.) 105; *Eng. Partn. Act*, 1890, § 40 (b), 3. See "*Partnership*," *Dec. Dig. (Key No.)* § 304; *Cent. Dig.* § 702.

<sup>40</sup> *GROTH et al. v. KERSTING et al.*, 23 Colo. 213, 47 Pac. 393, *Gilmore, Cas. Partnership*, 484; *MOLINEAUX v. RAYNOLDS*, 54 N. J. Eq. 559, 35 Atl. 536, *Gilmore, Cas. Partnership*, 215; *Binney v.*

pecially in a partnership for a single venture, that the mere use of the capital is contributed by a partner, and the partnership is in the profits only. In this case "the capital remains the property of the individual partner to whom it originally belonged, any loss or destruction of it falls upon him as the owner, and, as it never becomes the property of the partnership, the partnership owes him nothing in consideration thereof."<sup>41</sup>

With regard to interest on capital, the same general rule prevails as stated for the majority holdings with regard to interest on advances, namely, that in the absence of agreement a partner will not be allowed interest on his capital in the firm.<sup>42</sup>

#### *Same—Division of Surplus*

Assuming partnership debts, advances, and capital all taken care of, the surplus is to be distributed among the partners in proportion to their interest in the firm. This, in turn, as previously indicated, depends upon the agreement of the parties, which, if not a matter of construction of a written document, is a pure question of fact.<sup>43</sup> In the ab-

Mutrie, 12 App. Cas. 160. See "*Partnership*," *Dec. Dig. (Key No.)* §§ 304-306; *Cent. Dig.* §§ 702-709.

<sup>41</sup> WHITCOMB v. CONVERSE, 119 Mass. 38, 20 Am. Rep. 311, Gilmore, Cas. Partnership, 488, per Gray, C. J. See, also, SHEA v. DONAHUE, 15 Lea (Tenn.) 160, 54 Am. Rep. 407, Gilmore, Cas. Partnership, 168; Conroy v. Campbell, 45 N. Y. Super. Ct. 326. That in some jurisdictions it is held that a partner who furnished labor as his part of the capital cannot be required to bear any part of his copartner's money contribution, see Meadows v. Mocquot, 110 Ky. 220, 61 S. W. 28, 22 Ky. Law Rep. 1646; Heran v. Hall, 1 B. Mon. (Ky.) 159, 35 Am. Dec. 178; Everly v. Durborrow, 8 Phila. (Pa.) 93; Johnson v. Jackson (1908) 130 Ky. 751, 114 S. W. 260. See "*Partnership*," *Dec. Dig. (Key No.)* §§ 72, 304; *Cent. Dig.* §§ 117, 702.

<sup>42</sup> Hatzfeld v. Walsh (Tex. Civ. App.) 120 S. W. 525 (1909); TAFT v. SCHWAMB, 80 Ill. 289; Jackson v. Johnson, 11 Hun (N. Y.) 509; Kelley v. Turner, 81 Md. 269, 31 Atl. 700; Clark v. Worden, 10 Neb. 87, 4 N. W. 413. Cf. Ligare v. Peacock, 109 Ill. 94. See "*Partnership*," *Dec. Dig. (Key No.)* § 75; *Cent. Dig.* §§ 120-123.

<sup>43</sup> Peacock v. Peacock, 16 Ves. 49; McGregor v. Bainbridge, 7 Hare, 164; Blnford v. Dommatt, 4 Ves. 756. See "*Partnership*," *Dec. Dig. (Key No.)* § 306; *Cent. Dig.* §§ 706-709.

sence of evidence showing a contrary intention, the shares of all the partners are presumed to be equal.<sup>44</sup>

*Claims Between Partners*

It has already been noted that valid claims by any partner against the firm upon firm transactions are credited to him;<sup>45</sup> but as a general rule claims growing out of individual transactions between the partners are not taken into account in the adjustment and distribution of their respective shares.<sup>46</sup> Where the debtor partner is insolvent, however, a court of equity, in order to protect his copartners, may compel a set-off of the claims of the other partners against him, though these do not arise out of the firm transactions. "If, on the accounting and settlement of the partnership matters, anything shall be found due the plaintiff from the partnership, and it should be paid over to him, it would, apparently, be impossible for the defendants to obtain satisfaction of their claims against him. Actions at law upon these claims would be futile. So it seems that justice requires whatever sum may be found due to the plaintiff shall be applied to the payment of these claims of the defendants."<sup>47</sup>

<sup>44</sup> WHITCOMB v. CONVERSE, 119 Mass. 38, 20 Am. Rep. 311, Gilmore, Cas. Partnership, 488; Ligare v. Peacock, 109 Ill. 94; TAFT v. SCHWAMB, 80 Ill. 289; Huger v. Cunningham, 128 Ga. 684, 56 S. E. 64; Taylor v. Coffin, 18 Ill. 422; Woelfel v. Thompson, 173 Mass. 301, 53 N. E. 819. Where two solicitors joined in the conduct of a single case, though paid separately, and doing unequal amounts of work, it was held, in the absence of satisfactory evidence, that they were entitled to share equally in the fees. Robinson v. Anderson, 20 Beav. 98. Losses, in the absence of agreement to the contrary, are to be borne like profits. See "*Partnership*," Dec. Dig. (Key No.) § 76; Cent. Dig. §§ 116, 124.

<sup>45</sup> Supra, p. 395.

<sup>46</sup> Caldwell v. Leiber, 7 Paige (N. Y.) 483; Goldthwait v. Day, 149 Mass. 185, 21 N. E. 359; Reid v. McQuesten, 61 N. H. 421. See "*Partnership*," Dec. Dig. (Key No.) § 300; Cent. Dig. § 695.

<sup>47</sup> PENDLETON v. BEYER, 94 Wis. 31, 68 N. W. 415. See, also, Nichol v. Stewart, 36 Ark. 612. That as between the partners themselves, when the rights of creditors are not involved, an individual indebtedness from one partner to another may be deducted from a partnership balance due from the latter to the former, see Jones v.

### SAME—PARTNER'S SO-CALLED LIEN

137. By virtue of the partnership agreement each partner has a right to have all the firm assets applied first to the payment of firm debts and then to the settlement of claims inter se. As such right will be enforced in equity, each partner has what is loosely termed a lien on the partnership effects to secure the accomplishment of these ends.

#### *Definition and Scope*

The lien of a partner has already been defined in the sections discussing the right to have firm property applied in payment of firm debts.<sup>48</sup> While loosely called a lien, it is not in reality such. Each party to the partnership relation is considered as having agreed that the firm property shall first be devoted to the payment of the firm debts and obligations and to the adjustment of the claims of the partners inter se growing out of the relation. A court of equity recognizes in each partner a right to have the firm assets thus used, and will compel their application for such purposes. The lien goes even further than to the mere protection of firm obligations. It is attached by equity to the surplus assets of the firm for the purpose of having them applied in payment of what may be due to the partners, respectively, after deducting what may be due from them as partners to the firm.<sup>49</sup> It will be noted that the statement of the rule excludes from the force of the lien debts incurred between the firm and its members otherwise than in their

Jones, 23 Ark. 212; Parker v. Parker, 65 Barb. (N. Y.) 205. See "Partnership," Dec. Dig. (Key No.) §§ 300, 333, 334; Cent. Dig. §§ 695, 734, 792-796.

<sup>48</sup> Ante, chapter III, § 58, p. 179.

<sup>49</sup> Kempton v. People, 139 Ill. App. 563; Bardwell v. Perry, 19 Vt. 292, 47 Am. Dec. 687; Pearson v. Keedy, 6 B. Mon. (Ky.) 128, 43 Am. Dec. 160; WARREN v. TAYLOR, 60 Ala. 218, Gilmore, Cas. Partnership, 446. See "Partnership," Dec. Dig. (Key No.) §§ 89, 179, 182, 246, 309; Cent. Dig. §§ 137, 314, 318, 522, 715-717.

capacity as partners.<sup>50</sup> Nor does the lien cover individual debts owed by one partner to another.<sup>51</sup>

This right or lien of the partners does not become of practical importance, nor are its effects felt, until the affairs of the partnership have to be wound up, or the share of a partner ascertained. It does not give a partner a right to insist, as against a judgment creditor of the firm, that he has recourse to the assets of the firm before seeking to obtain payment from the partners individually.<sup>52</sup>

*To What Property the Lien Attaches*

So long as the partnership lasts, the lien attaches to everything that can be considered partnership property, and is not, therefore, lost by the substitution of new stock in trade for old.<sup>53</sup> No lien, however, is allowed if the partnership is illegal, unless it be possible to disassociate completely the illegality from the transactions or agreement relied on as the basis of the lien.<sup>54</sup> Nor does the lien extend the property acquired subsequently to dissolution by those who are carrying on the business, therein differing from

<sup>50</sup> *Doddington v. Hallet*, 1 Ves. Sr. 497; 1 Lindl. Part. 354; *Uhler v. Semple*, 20 N. J. Eq. 288; *Skipp v. Harwood*, 2 Swanst. 586; *Scheuer v. Berringer*, 102 Ala. 216, 14 South. 640. See "*Partnership*," *Dec. Dig. (Key No.)* § 89; *Cent. Dig.* § 137.

<sup>51</sup> *Mack v. Woodruff*, 87 Ill. 570; *Mumford v. Nicoll*, 20 Johns. (N. Y.) 611; *Lewis v. Harrison*, 81 Ind. 278. Notes given by defendants, with sureties, for the price of a half interest in property of the plaintiff for the purpose of forming a partnership with plaintiff in the property, are not partnership debts for which the firm property is liable. *Clapp v. Adams*, 143 Iowa, 697, 121 N. W. 44.

But see ante, note 47, p. 399. See "*Partnership*," *Dec. Dig. (Key No.)* § 89; *Cent. Dig.* § 137.

<sup>52</sup> *Clayton v. May*, 68 Ga. 27; *Randolph v. Daly*, 16 N. J. Eq. 313. See "*Partnership*," *Dec. Dig. (Key No.)* §§ 89, 309; *Cent. Dig.* §§ 137, 715-717.

<sup>53</sup> *Stocken v. Dawson*, 9 Beav. 239, 17 Law J. Ch. 282. See, also, *Hiscock v. Phelps*, 49 N. Y. 97; *Evans v. Hawley*, 35 Iowa, 83, as to partnership property in the name of one partner. See "*Partnership*," *Dec. Dig. (Key No.)* § 89; *Cent. Dig.* § 137.

<sup>54</sup> *Fryer v. Harker*, 142 Iowa, 703, 121 N. W. 526, 23 L. R. A. (N. S.) 477; *Ewing v. Osbaldiston*, 2 Mylne & C. 88. See ante, chapter II, § 30, p. 100. See "*Partnership*," *Dec. Dig. (Key No.)* § 89; *Cent. Dig.* § 137.

the lien of a mortgagee on a varying stock in trade.<sup>55</sup> If the partnership is one in profits only, the lien can attach only to the profits, for the means by which the profits were produced were not firm property.<sup>56</sup> Since a partner has no right to apply the partnership property to his own individual uses or debts, the lien will attach to property as transferred, unless the transferee is a bona fide holder for value.<sup>57</sup>

*Against Whom Available*

The partner's lien exists against a partner or any one claiming through him a share in the partnership assets.<sup>58</sup> Accordingly it is available against executors of a deceased partner, the trustee of a bankrupt partner, or the assignee of a partner's share.<sup>59</sup> The extent and force of the lien is well illustrated in the case of *Warren v. Taylor*,<sup>60</sup> where A. filed a bill for accounting and settlement against his partner, B., and against C., to whom B. had given a mortgage on his (B.'s) interest in the firm. While B. had given A. a mortgage, also, to indemnify the latter for the firm's protection against some paper of B.'s, this mortgage was not recorded until after the one to C., so that, if A. were to prevail over C., he must rely strictly on the priority of the partner's lien. It was held that C. could claim under his

<sup>55</sup> *Nerot v. Burnand*, 4 Russ. 247, 2 Bligh (N. S.) 215; *Payne v. Hornby*, 25 Beav. 280. See "Partnership," *Dec. Dig. (Key No.)* § 309; *Cent. Dig.* §§ 715-717.

<sup>56</sup> *Stevens v. Faucet*, 24 Ill. 483; *Voorhees v. Jones*, 29 N. J. Law, 270; *Robbins v. Laswell*, 27 Ill. 365. See "Partnership," *Dec. Dig. (Key No.)* §§ 89, 309; *Cent. Dig.* §§ 137, 715-717.

<sup>57</sup> *Farwell v. St. Paul Trust Co.*, 45 Minn. 495, 48 N. W. 326, 22 Am. St. Rep. 742; *JANNEY v. SPRINGER*, 78 Iowa, 617, 43 N. W. 461, 16 Am. St. Rep. 460, *Gilmore, Cas. Partnership*, 243. See "Partnership," *Dec. Dig. (Key No.)* §§ 89, 97; *Cent. Dig.* §§ 137, 147.

<sup>58</sup> *Hobbs v. McLean*, 117 U. S. 567, 6 Sup. Ct. 870, 29 L. Ed. 940; *Hoyt v. Sprague*, 103 U. S. 613, 26 L. Ed. 535. See "Partnership," *Dec. Dig. (Key No.)* §§ 89, 182; *Cent. Dig.* §§ 137, 318.

<sup>59</sup> *Kirby v. Shoonmaker*, 3 Barb. Ch. (N. Y.) 46, 49 Am. Dec. 160; *Cavander v. Bulteel*, L. R. 9 Ch. 79. See "Partnership," *Dec. Dig. (Key No.)* §§ 89, 178-183, 309; *Cent. Dig.* §§ 137, 310-336, 715-717.

<sup>60</sup> *WARREN v. TAYLOR*, 60 Ala. 218, *Gilmore, Cas. Partnership*, 446. See "Partnership," *Dec. Dig. (Key No.)* §§ 89, 179, 182; *Cent. Dig.* §§ 137, 314, 318.

mortgage only what B. could claim if B. were suing A.; that when C. bought or accepted as security B.'s interest in the partnership effects, it was C.'s duty to inquire of the other partner, A., how the account stood between them.

*Same—How Lost*

The lien will be lost if the firm property is converted into the separate property of a partner,<sup>61</sup> or is validly sold to a stranger with the other partner's assent. Still less is it available against a purchaser from a partner of specific chattels of the firm.<sup>62</sup> Similarly, if on the dissolution of the firm its property is divided between the partners in specie on the understanding that the debts shall be taken care of in some specified manner, the lien is lost, and no partner has the right to have the property brought back into the common stock and applied in liquidation of the firm debts.<sup>63</sup>

<sup>61</sup> *Giddings v. Palmer*, 107 Mass. 269; *Robertson v. Barker*, 11 Fla. 192; *Parker v. Merritt*, 105 Ill. 203; ante, chapter III, §§ 56-60, p. 176 et seq. See "*Partnership*," *Dec. Dig. (Key No.)* §§ 89, 179, 182, 309; *Cent. Dig.* §§ 137, 314, 318, 715-717.

<sup>62</sup> *In re Langmead's Trusts*, 7 De Gex, M. & G. 353. See "*Partnership*," *Dec. Dig. (Key No.)* §§ 89, 309; *Cent. Dig.* §§ 137, 715-717.

<sup>63</sup> *Giddings v. Palmer*, 107 Mass. 269; *Miller v. Estill*, 5 Ohio St. 508, 67 Am. Dec. 305; *Lingen v. Simpson*, 1 Sim. & S. 600; *In re Langmead's Trust*, 7 De Gex, M. & G. 353; *Smith v. Edwards*, 7 Humph. (Tenn.) 106, 46 Am. Dec. 71. But see chapter III, §§ 56-60, p. 176 et seq. See "*Partnership*," *Dec. Dig. (Key No.)* §§ 89, 277-282; *Cent. Dig.* §§ 137, 622-641.

## CHAPTER VII

## REMEDIES OF CREDITORS

- 138. Remedies at Law.
- 139. Creditors of the Partnership.
- 140. Creditors of the Separate Partner.
- 141. Garnishment of Partnership Debtors.
- 142. Remedies in Equity—Insolvency or Bankruptcy of Firm.
- 143. Firm Creditors Against the Firm Estate.
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- 145. Partners Against the Firm Estate.
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- 148. Partner Against the Separate Estate of a Copartner.
- 149. Rights of Secured Creditors.
- 150. Rights of Joint and Several Creditors—Double Proof.
- 151. Insolvency or Bankruptcy of a Partner.
- 152. Rights Against Estate of Deceased Partner.

## REMEDIES AT LAW

138. The remedies which the creditors of the partnership or of the separate partners have against the partnership property will be considered under the following heads:
- (a) Creditors of the Partnership.
  - (b) Creditors of the Separate Partners.

## SAME—CREDITORS OF THE PARTNERSHIP

139. While a firm obligation is joint, the judgment thereon is several in its effects, and may be satisfied out of the firm property or the separate property of any or all of the partners, at the option of the firm creditor.

*Judgment on a Firm Obligation*

As the law does not treat the firm as an entity, a firm debt is the debt of the members composing the firm. While

the obligation is joint, and is governed in the main by the law relating to joint obligations, yet when an action is brought upon it, and a judgment is procured, the judgment is several in its effect. A firm creditor in whose favor it has been rendered may satisfy it out of the firm property, or out of the separate property of any or all of the partners. The judgment becomes a lien upon the firm and separate real estate of each partner, and upon execution and levy the chattels of the firm and of the partners may be seized.<sup>1</sup> The firm creditor may at his option proceed against either the firm or the separate property, as neither partner has a right to demand that he proceed against the firm assets, even though ample to meet his judgment.<sup>2</sup> The judgment of the firm creditors takes precedence against the firm property over the judgments of the separate creditors, although obtained subsequently. It is not affected by any prior mortgage, assignment, lien, or other incumbrance upon the separate interest of the partners, as such interest pertains to the surplus only after the firm debts have been paid.<sup>3</sup>

#### *Action in the Firm Name*

At common law all the members of a partnership must be joined as defendants in an action on a firm obligation, as such obligations were regarded as joint. The nonjoinder of all, however, did not defeat the action, but was merely a ground for a plea in abatement.<sup>4</sup> If the partners actually

<sup>1</sup> MEECH v. ALLEN, 17 N. Y. 300, 72 Am. Dec. 465, Gilmore, Cas. Partnership, 499; Steiner v. Peters Store Co., 119 Ala. 371, 24 South. 576; Ferry & Co. v. Mattox & Turner, 2 Ga. App. 104, 58 S. E. 291; McDuffie v. Bartlett, 3 Pa. 317; Stout v. Baker, 32 Kan. 113, 4 Pac. 141; Wisham v. Lippincott, 9 N. J. Eq. 353; Hunter v. Martin, 2 Rich. Law (S. C.) 541; De Camp v. Bates (Tex. Civ. App.) 37 S. W. 644. See "Partnership," Dec. Dig. (Key No.) §§ 165, 219, 220; Cent. Dig. §§ 301, 429-469.

<sup>2</sup> Loudon v. Ball, 93 Ind. 232; HAMSMITH v. ESPY, 13 Iowa, 439; Barrett v. Furnish, 21 Or. 17, 26 Pac. 861; Webb v. Gregory, 49 Tex. Civ. App. 282, 108 S. W. 478. See "Partnership," Dec. Dig. (Key No.) §§ 165, 187, 219, 220; Cent. Dig. §§ 301, 340, 342, 429-469.

<sup>3</sup> Jones v. Parsons, 25 Cal. 100; Whitmore v. Shilverick, 3 Nev. 288. See chapter III, § 55, pp. 170-175. See "Partnership," Dec. Dig. (Key No.) §§ 180, 181; Cent. Dig. §§ 315-319.

<sup>4</sup> Rice v. Shute, 5 Burr. 2811. See "Partnership," Dec. Dig. (Key No.) § 200; Cent. Dig. §§ 369-371.

sued did not raise the question of nonjoinder of their co-partners, a judgment against those made defendants would be binding upon them. In such a case the judgment could not, of course, be enforced against those not joined, and their obligation, being joint, was extinguished by the judgment.<sup>5</sup> If, however, the defendants insisted that all the co-partners be brought in, the action could not proceed. To relieve from the hardships of such a rule, statutory modifications have been made quite generally in the United States, which permit an action against fewer than all the promissors.<sup>6</sup> In some jurisdictions, also, by statute it is possible to bring an action against the partnership in the partnership name. Under such statutes the judgment is only against the common property of the partners and the private property of the partner actually served with process. A judgment entered in such a name is a lien on the partnership property only.<sup>7</sup>

#### *Garnishment*

The partner being liable for the debts of the firm, assets of a partner in the hands of a third person may be reached by garnishment or trustee process based on a firm obligation. "As the debt due from the partners jointly is also due from each, it may be enforced against the separate property of each. It is immaterial whether the separate property is in the form of goods and movable chattels, or goods, effects, and credits intrusted and deposited in such a manner that they can only be attached upon a trustee process. It is not nec-

<sup>5</sup> *MASON v. ELDRED*, 6 Wall. 231, 18 L. Ed. 783, Gilmore, Cas. Partnership, 281. See note 6, chapter IV, § 70, p. 220. See "*Partnership*," *Dec. Dig. (Key No.)* §§ 200, 219; *Cent. Dig.* §§ 369-371, 429-445.

<sup>6</sup> *Stimson's Am. St. Law*, § 5015. See, also, ante, chapter IV, § 70, p. 220.

<sup>7</sup> *Baldrige v. Eason*, 99 Ala. 516, 13 South. 74; *Ladiga Saw-Mill Co. v. Smith*, 78 Ala. 108; *Fox's Appeal*, 8 Sadler (Pa.) 393; *Hensley v. Bagdad Sash Factory Co.*, 1 White & W. Civ. Cas. Ct. App. (Tex.) § 718.

In Louisiana the same procedure is possible under the conception of the civil law which regards the firm as an entity. *Martin v. Meyer* (C. C.) 45 Fed. 435. See "*Partnership*," *Dec. Dig. (Key No.)* §§ 197, 200, 219; *Cent. Dig.* §§ 360, 369-371, 429-445.

essary that the principal debtors should have made a joint deposit, or that the fund should belong to them jointly. It is enough if funds attachable upon a trustee process are due from the alleged trustee to either one of the principal defendants."\*

#### *Attachment*

A distinction should be drawn between seizure on final execution and attachment on mesne process. The latter is a statutory remedy of a harsh and extraordinary sort. The courts construe the statutes strictly, and will not extend the remedy beyond the clear intendment of the law. Such statutes usually enumerate certain acts of a debtor which will constitute a cause for attachment, such as nonresidence, secreting or wasting his property, or intending to take it out of the jurisdiction. In an action against a partnership, the question arises, therefore, whether a firm creditor can have the advantage of an attachment. It is held that he may, if the grounds for the attachment exist against all the partners. If, for example all of the partners are absent from the jurisdiction, or all have been guilty of misconduct, the firm property may be attached. If, however, only one is absent, or if only one has been guilty of misconduct, it is generally held that firm property cannot be attached on such grounds.<sup>9</sup> If, however, the other members can be shown to have authorized the misconduct of a single partner, such misconduct becomes theirs, and, if within the statutory grounds for attachment, firm property may be attached because of it.<sup>10</sup>

#### *Same—Separate Property of a Partner*

While the remedy of attachment on mesne process does not, in general, lie against the property of a firm, one of whose members only has committed an act which is a stat-

\* STEVENS v. PERRY, 113 Mass. 380. See "Partnership," Dec. Dig. (Key No.) § 208; Cent. Dig. §§ 383-400.

<sup>9</sup> JAFFRAY v. JENNINGS, 101 Mich. 515, 60 N. W. 52, 25 L. R. A. 645, Gilmore, Cas. Partnership, 503; YERKES v. McFADDEN, 141 N. Y. 136, 36 N. E. 7; Evans v. Virgin, 69 Wis. 153, 33 N. W. 569; HOLLINGSHEAD v. CURTIS, 14 N. J. Law, 402. See "Partnership," Dec. Dig. (Key No.) § 208; Cent. Dig. §§ 383-400.

<sup>10</sup> Winner v. Kuehn, 97 Wis. 394, 72 N. W. 227; Keith v. Arm-

utory ground for attachment, it will lie against the property of the partner, who has committed the act, on a debt due from the firm of which he is a member.<sup>11</sup> Where the partnership property cannot be reached on attachment, however, it is not permissible to attach the property of innocent partners.<sup>12</sup>

### *Exemption*

It is usually said that the exemption statutes, which permit a debtor to hold certain property against his creditor, are not applicable to property held in the partnership relation; that these statutes are designed for single debtors. Thus, in *Pond v. Kimball*,<sup>13</sup> in construing the Massachusetts statute of exemption, the court said: "We agree with the plaintiff's counsel that the statute is humane and beneficial in its purpose and operation, and fairly entitled to as liberal a construction as can be given it, consistently with its true and just interpretation. There are many difficulties, however, in the way of applying it to the case of copartners and joint owners, and these difficulties we find to be insuperable. \* \* \* It appears to us that the statute is intended to apply only to the case of a single and individual debtor. The exemption which it gives is strictly personal. \* \* \* Its apparent object is to secure to the debtor the means of supporting himself and his family, by following his trade or handicraft with tools belonging to himself." The foregoing quotation represents the weight of authority, so long as there has been no severance of interest by the partners.<sup>14</sup>

strong, 65 Wis. 225, 26 N. W. 445. See "*Partnership*," *Dec. Dig. (Key No.)* § 208; *Cent. Dig.* §§ 383-400.

<sup>11</sup> *In re Chipman*, 14 Johns. (N. Y.) 217; *In re Smith*, 16 Johns. (N. Y.) 102. See "*Partnership*," *Dec. Dig. (Key No.)* § 208; *Cent. Dig.* §§ 383-400.

<sup>12</sup> *JAFFRAY v. JENNINGS*, 101 Mich. 515, 60 N. W. 52, 25 L. R. A. 645, *Gilmore, Cas. Partnership*, 503. See "*Partnership*," *Dec. Dig. (Key No.)* § 208; *Cent. Dig.* §§ 383-400.

<sup>13</sup> *POND v. KIMBALL*, 101 Mass. 105. See "*Exemptions*," *Dec. Dig. (Key No.)* § 61; *Cent. Dig.* §§ 83-87.

<sup>14</sup> *HART v. HIATT*, 2 Ind. T. 245, 48 S. W. 1038, *Gilmore, Cas. Partnership*, 567; *Thurlow v. Warren*, 82 Me. 164, 19 Atl. 158, 17 Am. St. Rep. 472; *Schlapback v. Long*, 90 Ala. 525, 8 South. 113;

As already noticed,<sup>15</sup> partnership property is, by virtue of the implied agreement of the partners, liable for the payment of the firm debts, and no partner may claim a share in any specific property until such debts have been discharged and the firm business wound up. According to this doctrine, it should be held, therefore, that one partner cannot claim an exemption out of the firm property; for as a result of the partnership agreement he does not own such property for his individual uses. If, however, all the partners mutually sever their interests in the common property, it would seem that each partner might claim an exemption out of his share, provided, of course, the property was of a kind that was subject to exemption. It should be noticed that in *Pond v. Kimball*<sup>16</sup> "it does not appear that at the time of the attachment the plaintiffs had dissolved partnership, or had divided their joint property, or had had a general settlement and winding up of their business." Until such settlement and decision, clearly no one partner can claim an exemption. But the inference is that, if they had severed their interests, they might claim the statutory exemption. It is held, therefore, in some jurisdictions, that, if the partners mutually agree to dissolve the relation and divide up the property, each may claim an exemption out of the share coming to him.<sup>17</sup> Further, it is held that the partners may sever their interests and claim their exemption, even after the property has been actually levied upon by the firm creditors.<sup>18</sup> A distinction is made in some of

State ex rel. *Peck v. Bowden*, 18 Fla. 17. See "*Exemptions*," Dec. Dig. (Key No.) § 61; Cent. Dig. §§ 83-87.

<sup>15</sup> See chapter III, § 53, p. 179.

<sup>16</sup> *POND v. KIMBALL*, 101 Mass. 105. See "*Exemptions*," Dec. Dig. (Key No.) § 61; Cent. Dig. §§ 83-87.

<sup>17</sup> *Blanchard v. Paschal*, 68 Ga. 32, 34, 45 Am. Rep. 474; *Scott v. Kenan*, 94 N. C. 296. Cases of partnership should be distinguished from case of mere joint ownership of chattels. *Stewart v. Brown*, 37 N. Y. 350, 93 Am. Dec. 578; *Radcliff v. Wood*, 25 Barb. (N. Y.) 52. See "*Partnership*," Dec. Dig. (Key No.) § 61; Cent. Dig. §§ 83-87.

<sup>18</sup> *Russell v. Lennon*, 39 Wis. 570, 20 Am. Rep. 60; *Ladwig v. Williams*, 87 Wis. 615, 58 N. W. 1103; *McKinney v. Baker*, 9 Or. 74; *Skinner v. Shannon*, 44 Mich. 86, 6 N. W. 108, 38 Am. Rep. 232.

the cases between a judgment against individual members of the firm and against the firm; in the former case exemption being allowed, but in the latter not.<sup>19</sup> Any severance of interest, however, which thus converts firm property into separate property, would be subject to attack on the ground of being fraudulent, according to the principles already discussed in a previous chapter.<sup>20</sup>

### SAME—CREDITORS OF THE SEPARATE PARTNER

140. The creditor of a separate partner, having reduced his claim to judgment, may satisfy the same out of the interest of his debtor in the partnership. This is done in most jurisdictions by a levy and actual seizure of all or a part of the partnership property, and a sale of the debtor partner's interest therein. This interest is the share coming to him after the firm debts have all been paid and the claims of the partners inter se have been adjusted. The purchaser at the execution sale acquires a right to have the value of such interest ascertained by an accounting and settlement of the partnership business, and to have the amount turned over to him which may be found due to the debtor partner.

But in *Stout v. McNeill*, 98 N. C. 1, 3 S. E. 915, the right was denied because one partner withdrew his consent to the severance. In *State v. Day*, 3 Ind. App. 155, 29 N. E. 436, the right was denied after the levy was made.

It has also been held that one partner may claim exemption out of a balance due him on a settlement of the partnership accounts against his individual creditor, who had an execution levied on the debtor's interest in the firm assets prior to dissolution. *Southern Jellico Coal Co. v. Smith*, 105 Ky. 769, 49 S. W. 807. See "*Exemptions*," *Dec. Dig. (Key No.)* § 61; *Cent. Dig.* §§ 83-87.

<sup>19</sup> *Wise v. Frey*, 7 Neb. 134, 29 Am. Rep. 380; *Servanti v. Lusk*, 43 Cal. 238; *Dennis v. Kass & Co.*, 13 Wash. 137, 42 Pac. 540. See "*Exemptions*," *Dec. Dig. (Key No.)* § 61; *Cent. Dig.* §§ 83-87.

<sup>20</sup> Chapter III, §§ 59, 60, pp. 181-194.

*Rights of Separate Creditors Against Firm Property Uncertain*

Though the rights of the firm creditors against the individual property of a partner are clear, the rights of the separate creditor of a partner against the firm property are uncertain, both in extent and value. This uncertainty results from the varying conceptions of the nature of a partner's interest in the partnership property. If he holds a legal title to an undivided part of it, which, in view of the legal conception of the nature of a partnership, it seems that he must, it might seem that a creditor who gets a legal claim against the assets of a single partner gets a claim against an undivided portion of the partnership property. It may well be held, however, that the legal interest which a partner has in the partnership property is not salable as an undivided interest, and therefore that those having claims against the partner cannot reach the share which he owns in the partnership. This, in effect, seems to be the view of the majority of courts at present. Though many say that a partner has no title or interest in any part of the partnership property, except in the surplus remaining after accounts are settled, this must be taken as meaning that this is his only salable interest. No other explanation of the facts, which will be shown later, that an execution purchaser of a partner's interest in a partnership gets nothing more than a right to an accounting, is adequate. It is not sufficient to say that this is because a partner himself has nothing more, while at the same time denying that the partnership itself has a legal existence.

*Enforcing Payment Against Partner's Interest in the Partnership—In General*

A creditor of a separate partner, who has reduced his claim to judgment, may satisfy the same out of any property, tangible or intangible, belonging to his debtor. The debtor's property may consist of his individual estate or of an interest in a partnership. The right of his judgment creditor to reach his separate property is entirely clear. When, however, an attempt is made by the creditor of the separate partner to satisfy his judgment out of the interest

of the debtor in the partnership, much confusion and diversity of practice prevails. It has also been recognized that such interest should be available for the partner's creditors, and courts of law have endeavored to bring it within the reach of an execution.

A writ of execution is the common-law instrument for the seizure of tangible property of a debtor. Intangible assets could not be taken upon such a writ, but must be reached by resort to equity. The property sought to be reached in the situation now under consideration is the interest of the judgment debtor partner in the partnership. This, then, raises the question as to the nature of that interest. The subject has been already discussed and frequently referred to.<sup>21</sup> In the language of the law of partnership, it is an interest in a surplus to be ascertained by an accounting between the partners. The surplus will be what is left of the partnership property after the firm debts have been paid and the accounts of the partners inter se have all been adjusted. Until the surplus or balance is ascertained, there is nothing tangible to which the interest can pertain. Pending such ascertainment the partner interest is a chose in action—a right to compel a settlement of the firm affairs and an establishment of the surplus. It is therefore intangible property, and logically is not of the sort which a writ of execution was designed to reach.

In the language of the law of property, however, the legal title to firm property is in the partners as individuals. They severally have a legal estate in tangible property. Therefore, on this view, a writ of execution is the proper instrument for reaching such interest. But, as pointed out,<sup>22</sup> this interest is held subject to certain obligations imposed by reason of the partnership agreement. A court of equity compels the partners to hold their interest in the firm property to discharge the partnership purposes, and forbids the use of it for individual purposes. A purchaser of a partner's interest takes the property subject to the same restrictions as the partner himself.

<sup>21</sup> See chapter III, § 55, pp. 170-175.

<sup>22</sup> Chapter III, §§ 59, 60, pp. 181-194.

By the law of property, the partner's interest pertains to tangible property; by the law of partnership, it is but an intangible chose in action. When a creditor of a separate partner seeks to satisfy his judgment out of the interest of his debtor in the firm, he uses a writ of execution issuing from a court of law and proceeding upon the theory of seizing tangible property to reach what in a court of equity is intangible property. Such a performance can produce nothing but confusion. It is not possible to examine in detail the practice in each jurisdiction. It will be sufficient to consider some of the more important questions.

*Same—Levy—Upon What Property—How Made*

As the execution is used to seize tangible property, the sheriff is entitled to seize firm property on an execution against one partner.<sup>23</sup> In fact, there was no other way in which he could serve his writ. As the legal title to firm property was deemed in law to be in the individuals composing the firm, as tenants in common, a seizure of a partner's interest involved a seizure of tangible property.<sup>24</sup> Whether the sheriff must seize all of the property, or need seize only a part, is a question on which the courts differ. In order to sell a partner's entire interest, some courts, proceeding upon the theory of partnership ownership as a tenancy in common, require that all the property be seized. "In an action against one of the partners, the officer must seize all the goods, because the moieties are undivided; for if he seize but a moiety, and sell that, the other partners will have a right to a moiety of that moiety. He must seize the entire leviable property of the copartnership. He must take and retain custody of the property, for

<sup>23</sup> *United States v. Williams*, Fed. Cas. No. 16,719; *Andrews v. Keith*, 34 Ala. 722; *Harris v. Phillips*, 49 Ark. 58, 4 S. W. 196; *Clark v. Cushing*, 52 Cal. 617; *White v. Jones*, 38 Ill. 159; *Wickham v. Davis*, 24 Minn. 167; *Lester ex rel. Wright v. Givens*, 74 Mo. App. 395; *Read v. McLanahan*, 47 N. Y. Super. Ct. 275; *Cogswell v. Wilson*, 17 Or. 31, 21 Pac. 388. See "*Partnership*," *Dec. Dig. (Key No.)* § 220; *Cent. Dig.* §§ 448, 449.

<sup>24</sup> *HEYDON v. HEYDON*, 1 Salk. 392, *Gilmore, Cas. Partnership*, 507. See "*Partnership*," *Dec. Dig. (Key No.)* § 220; *Cent. Dig.* §§ 448, 449.

in no other way can he legally execute the writ and sell as much of the interest of his judgment debtor as may be sufficient to satisfy the execution."<sup>25</sup> Other courts, however, permit a levy on less than all the chattels as sufficient to make a sale of the partner's entire interest.<sup>26</sup> Again, other courts permit a levy by a constructive seizure only. An actual seizure of part or all of the firm chattels is treated as a trespass.<sup>27</sup>

*Same—Right of Parties After Levy—Sheriff and Other Partners*

While in many jurisdictions an actual seizure of a part or all of the firm property is necessary to make a levy effective to reach a separate partner's interest, the cases are conflicting as to the rights of the sheriff and the other partners after levy. According to the earlier English cases the sheriff proceeded on the theory of seizing and selling the interest of a tenant in common, and therefore was entitled to possession of the property seized.<sup>28</sup> By the later cases it was held that, while the sheriff was entitled to seize the chattels in order to effect a levy, he could not take them out of the possession of the other partners.<sup>29</sup> In the United States it is held by some courts that the sheriff may take exclusive possession of the property seized.<sup>30</sup> Under this

<sup>25</sup> HEYDON v. HEYDON, *supra*; Branch v. Wiseman, 51 Ind. 1; Whigham's Appeal, 63 Pa. 194. See "Partnership," Dec. Dig. (Key No.) § 220; Cent. Dig. §§ 446-469.

<sup>26</sup> Fogg v. Lawry, 68 Me. 78, 28 Am. Rep. 19; Hershfield v. Claffin, 25 Kan. 166, 37 Am. Rep. 237; Wiles v. Maddox, 26 Mo. 77. See "Partnership," Dec. Dig. (Key No.) § 220; Cent. Dig. §§ 446-469.

<sup>27</sup> SANBORN v. ROYCE, 132 Mass. 594, Gilmore, Cas. Partnership, 510; Hutchinson v. Dubois, 45 Mich. 143, 7 N. W. 714; Tucker v. Adams, 63 N. H. 361; Vandike v. Roskam, 67 Pa. 330. See "Partnership," Dec. Dig. (Key No.) § 220; Cent. Dig. §§ 446-469.

<sup>28</sup> HEYDON v. HEYDON, 1 Salk. 392, Gilmore, Cas. Partnership, 507; DUTTON v. MORRISON, 17 Ves. 193. See "Partnership," Dec. Dig. (Key No.) § 220; Cent. Dig. §§ 446-469.

<sup>29</sup> Burnell v. Hunt, 5 Jur. 650. See "Partnership," Dec. Dig. (Key No.) § 220; Cent. Dig. §§ 446-469.

<sup>30</sup> Haskins v. Everett, 4 Sneed (Tenn.) 531.

"For what purpose does a sheriff seize property on a *fi. fa.*, if not to remove and sell it? \* \* \* Is the law so absurd as to command a sheriff, by its writ, to seize and sell an article, yet forbid

view the other partners cannot bring replevin against the sheriff who takes firm assets on an execution against one partner,<sup>31</sup> and they are liable for damages if they take the property from him.<sup>32</sup> The property, however, remains liable for the firm debts, and no action of the sheriff can defeat this liability.<sup>33</sup> Other courts hold, however, that, even though firm property may be attached at the instance of a judgment creditor of a single partner, the attaching officer has no right to the exclusive possession of the property levied on. This view is based on the ground that, the debtor partner not being entitled to exclusive possession, no greater rights than he had can be secured by virtue of an execution against his property.<sup>34</sup>

him to remove it, or declare him a breaker of the peace for selling it, because he was resisted, and put to the exercise of force? This is a sort of imbecility which the common law has been careful to avoid in all cases." Cowen, J., in *Phillips v. Cook*, 24 Wend. (N. Y.) 389, 393, 394. See "*Partnership*," *Dec. Dig.* (Key No.) § 220; *Cent. Dig.* § 456.

<sup>31</sup> *SMITH v. ORSER*, 42 N. Y. 132. See "*Partnership*," *Dec. Dig.* (Key No.) § 220; *Cent. Dig.* §§ 446-469.

<sup>32</sup> *Haskins v. Everett*, 4 Sneed (Tenn.) 531. See "*Partnership*," *Dec. Dig.* (Key No.) § 220; *Cent. Dig.* §§ 446-469.

<sup>33</sup> *JOHNSON v. WINGFIELD* (Tenn. Ch. App.) 42 S. W. 203, *Gilmore, Cas. Partnership*, 515; *EIGHTH NAT. BANK OF CITY OF NEW YORK v. FITCH*, 40 N. Y. 539. See "*Partnership*," *Dec. Dig.* (Key No.) § 220; *Cent. Dig.* §§ 446-469.

<sup>34</sup> "The sheriff in this case seized and took possession of specific articles, and removed them altogether from plaintiff's control. It seems probable, though the evidence does not distinctly show, that he took possession of the whole livery stock and broke up the plaintiff's business. But whether he took the whole or only part is immaterial; in either case he seized specific articles when he had a right to seize undivided and indefinite interest only. He did this, also, in total disregard of the plaintiff's rights; for whereas the judgment debtor, as partner, could only have had joint possession with the plaintiff, the officer, levying on this right, assumed to take exclusive possession and remove the property to another place. \* \* \* At most, for the purpose of his writ, the officer only takes the debtor's place, and seizes an interest that can only be measured by final account." *Cooley, J.*, in *Hutchinson v. Dubois*, 45 Mich. 143, 146, 7 N. W. 714, 715.

It is sometimes required by statute that the property shall not be removed from the possession of the partnership. See *Richards v.*

*Same—Sale may be Enjoined*

Some jurisdictions permit an injunction to stay any sale whatever under an execution on a judgment against a single partner until an account of the partnership can be taken and the interest of the debtor partner determined.<sup>35</sup> Other jurisdictions refuse an injunction in the absence of an allegation that the property is needed to pay the firm debts and that the debtor partner would have no interest remaining after the firm debts were paid.<sup>36</sup>

*Same—What is Sold*

Proceeding further on the theory of selling the interest of a tenant in common, the sheriff sold an undivided interest in the tangible property seized. This was regarded in the earlier cases as carrying with it a right to an accounting to ascertain the interest of the debtor partner in the specific property. Later, however, the right to the accounting seems to have ceased to be recognized. An interest in tangible property was still sold, and the purchaser became a tenant in common with the other partners.<sup>37</sup> In time the sale seems to have been regarded as not passing any interest in specific property, but an interest in the partnership,<sup>38</sup> which was nothing more than "a mere right in

Haines, 30 Iowa, 574. See "*Partnership*," *Dec. Dig. (Key No.)* § 220; *Cent. Dig.* §§ 446-469.

<sup>35</sup> PLACE v. SWEETZER, 16 Ohio, 142, Gilmore, Cas. Partnership, 511; Osborn v. McBride, 3 Sawy. 590, Fed. Cas. No. 10,593; Moore v. Sample, 3 Ala. 319; Rainey v. Nance, 54 Ill. 29; Hubbard v. Curtis, 8 Iowa, 1, 74 Am. Dec. 283; Thompson v. Lewis, 34 Me. 167; Crooker v. Crooker, 46 Me. 250; Wiles v. Maddox, 28 Mo. 77; Phillips v. Cook, 24 Wend. (N. Y.) 389; Meyberg v. Steagall, 51 Tex. 351; Warren v. Wallis, 42 Tex. 478. See "*Partnership*," *Dec. Dig. (Key No.)* § 209; *Cent. Dig.* § 402.

<sup>36</sup> Brewster v. Hammet, 4 Conn. 540; Hubbard v. Curtis, 8 Iowa, 1, 74 Am. Dec. 283; Mowbray v. Lawrence, 13 Abb. Prac. (N. Y.) 317; MOODY v. PAYNE, 2 Johns. Ch. (N. Y.) 548. See "*Partnership*," *Dec. Dig. (Key No.)* § 209; *Cent. Dig.* § 402.

<sup>37</sup> Holmes v. Mentze, 4 A. & E. 127; Carter v. Roland, 53 Tex. 540. See "*Partnership*," *Dec. Dig. (Key No.)* § 220; *Cent. Dig.* §§ 459, 459½.

<sup>38</sup> JOHNSON v. WINGFIELD (Tenn. Ch. App.) 42 S. W. 203, Gilmore, Cas. Partnership, 515; Farley v. Moog, 79 Ala. 148, 58 Am. Rep. 585; Lane v. Lanfest, 40 Minn. 375, 42 N. W. 84. See "*Partnership*," *Dec. Dig. (Key No.)* § 220; *Cent. Dig.* §§ 459, 459½.

equity to call for an account."<sup>39</sup> If the sheriff attempted to sell the entire property, he became a trespasser ab initio, and could be sued for trespass or for conversion.<sup>40</sup>

*Same—Rights of Parties After Sale—Purchaser and Other Partners*

The purchaser on the execution sale, whether of an interest in tangible property or of a chose in action, acquires no greater rights than the debtor partner had. He does not become a partner, or acquire any right to participate in the partnership business.<sup>41</sup> The firm property is still subject to the payment of the firm debts and to the adjustment of the partnership accounts. Whether the purchaser has acquired anything of value by his purchase will depend upon the condition of the partnership affairs. If the firm is insolvent, or if the debtor partner is indebted to his copartners beyond the value of any share that might be coming to him, or if the adjustment of the mutual accounts between

<sup>39</sup> Farley v. Moog, 79 Ala. 148, 58 Am. Rep. 585. See "Partnership," Dec. Dig. (Key No.) § 220; Cent. Dig. §§ 459, 459½.

<sup>40</sup> RANDALL v. JOHNSON, 13 R. I. 338, Gilmore, Cas. Partnership, 508; Daniel v. Owens, 70 Ala. 297; Spalding v. Black, 22 Kan. 55; Moore v. Pennell, 52 Me. 162, 83 Am. Dec. 500; Walker v. Flitts, 24 Pick. (Mass.) 191; Waddell v. Cook, 2 Hill (N. Y.) 47, 37 Am. Dec. 372; Snell v. Crowe, 3 Utah, 26, 5 Pac. 522; White v. Morton, 22 Vt. 15, 52 Am. Dec. 75; Ford v. Smith, 27 Wis. 261. See "Partnership," Dec. Dig. (Key No.) § 220; Cent. Dig. §§ 457, 458.

<sup>41</sup> Peck v. Fisher, 7 Cush. (Mass.) 386; Lane v. Lanfest, 40 Minn. 375, 42 N. W. 84; STAATS v. BRISTOW, 73 N. Y. 264, Gilmore, Cas. Partnership, 211; Foster v. Barnes, 81 Pa. 377.

As already pointed out on page 416, the early English cases and many cases in the United States hold that the purchaser acquires an interest in the tangible property of the firm levied upon, and a common-law court attempted to ascertain the value of the debtor partner's interest in the property thus seized. Heydon v. Heydon, 1 Salk. 393. This action of account was discontinued in England, and until the English Partnership Act of 1890 (see p. 420) the purchaser was treated as a quasi tenant in common with the other partners, and had to ascertain the value of his interest as best he could. Holmes v. Mentze, 4 A. & E. 127. See PARKER v. PISTOR, 3 Bos. & P. 288, Gilmore, Cas. Partnership, 507; TAYLOR v. FIELD, 4 Ves. 396, Gilmore, Cas. Partnership, 210; Chapman v. Koops, 3 Bos. & P. 289. See "Partnership," Dec. Dig. (Key No.) § 220; Cent. Dig. §§ 459, 459½.

the partners exhausts his share, the purchaser acquires nothing.<sup>42</sup> It has been held that purchaser rights are postponed to a mortgage executed by all the partners after the execution sale.<sup>43</sup> The only effective way of ascertaining the value of the debtor partner's interest is by resort to a court of equity, where a complete accounting and adjustment can be had. Accordingly a bill may be maintained by the purchaser against the partners, asking that an accounting be had and that the interest of the debtor partner be determined.<sup>44</sup>

<sup>42</sup> *Wilson v. Strobach*, 59 Ala. 488; *Wright v. Ward*, 65 Cal. 525, 4 Pac. 534; *Chandler v. Lincoln*, 52 Ill. 74; *Peck v. Fisher*, 7 Cush. (Mass.) 386; *Williams v. Gage*, 49 Miss. 777; *STAATS v. BRISTOW*, 73 N. Y. 264, *Gilmore, Cas. Partnership*, 211; *Foster v. Barnes*, 81 Pa. 377. See "*Partnership*," *Dec. Dig. (Key No.)* § 220; *Cent. Dig.* §§ 459, 459½; "*Execution*," *Cent. Dig.* § 754.

<sup>43</sup> *Clements v. Jessup*, 36 N. J. Eq. 572. Cf. *First Nat. Bank of Cooperstown v. State Sav. Bank of Ionia*, 130 Mich. 332, 89 N. W. 941; *Cundey v. Hall*, 208 Pa. 342, 57 Atl. 761, 101 Am. St. Rep. 938. See "*Partnership*," *Dec. Dig. (Key No.)* § 220; *Cent. Dig.* §§ 459, 459½.

<sup>44</sup> *JOHNSON v. WINGFIELD* (Tenn. Ch. App.) 42 S. W. 203, *Gilmore, Cas. Partnership*, 515; *Ticonic Bank v. Harvey*, 16 Iowa, 141; *ARNOLD v. HAGERMAN*, 45 N. J. Eq. 186, 17 Atl. 93, 14 Am. St. Rep. 712, *Gilmore, Cas. Partnership*, 223; *Hubble v. Perrin*, 3 Ohio, 287; *Cogswell v. Wilson*, 17 Or. 31, 21 Pac. 388; *Sterling v. Brightbill*, 5 Watts (Pa.) 229, 30 Am. Dec. 304. The other partners may file a bill for an accounting of the partnership in case an execution is levied upon partnership property on a judgment against one partner. *AULTMAN v. FULLER*, 53 Iowa, 63, 4 N. W. 809, *Gilmore, Cas. Partnership*, 526. See, also, chapter IX, § 167, note 4, p. 499.

In *JOHNSON v. WINGFIELD*, *supra*, where the subject is fully considered, both with regard to the law in Tennessee and elsewhere, the court lays down the following rules as representing the law of Tennessee: "(1) That partnership property may be levied on by the creditor for the individual debt of a member of the firm. (2) That specific property may be levied on, and it is not necessary that the execution be levied upon all the property of the firm. (3) That the officer may, and that in fact it is his duty to, take actual possession of the property levied on, and retain it until the sale is made. (4) That the purchaser only takes the interest of such judgment debtor after the settlement and adjustment of the partnership accounts, as is the language used in the case of *Haskins v. Everett*, 4 Sneed, 531, or a mere right to an accounting, as stated in another

*Statutory Modifications*

The use of the writ of execution, designed originally for tangible property, to reach partner's interest in the firm, which is in reality an intangible right, is a perversion. It is anomalous and unsatisfactory. It "tends to embarrass and possibly to break up the copartnership business; but we do not see how these consequences can be avoided at law, even if they can in equity, without remedial legislation."<sup>45</sup> Various remedial changes have been made in different jurisdictions; some modifying the procedure under the execution, and some abolishing the remedy by execution entirely and substituting in its stead a different remedy. Thus in Texas it is provided that "a levy upon the interest of a partner in partnership property is made by leaving a notice with one or more of the partners, or with a clerk of the partnership,"<sup>46</sup> thereby making an actual seizure unnecessary. In some jurisdictions, for instance, in Iowa<sup>47</sup> and Kentucky,<sup>48</sup> it is provided that the officer levying the execution shall be permitted to take possession for the purpose of having the property appraised and an inventory taken. In New York the partners other than the debtor may secure the release of the property by making an application to the court and giving an undertaking to the effect that they will account to the purchaser of the debtor partner's interest on the execution sale for the value of his interest as found due upon an accounting.<sup>49</sup> The

case. (5) That, as stated by Judge Freeman in *Lincoln Sav. Bank v. Gray*, 12 Lea, 459, a levy is necessary in order to fix a lien so as to authorize the filing of a bill." See "*Partnership*," *Dec. Dig. (Key No.)* § 220; *Cent. Dig.* § 452.

<sup>45</sup> *Trafford v. Hubbard*, 15 R. I. 326, 328, 4 Atl. 762. See "*Partnership*," *Dec. Dig. (Key No.)* § 220; *Cent. Dig.* §§ 446-469.

<sup>46</sup> Article 2352, Sayles' Ann. Civ. St. Tex. 1897; *Adoue v. Wettermark*, 36 Tex. Civ. App. 585, 82 S. W. 797. If a levy is properly made under such statute the sheriff may proceed to sell on execution; but it has been held that the notice mentioned by the statute must be left with some partner other than the debtor partner. *Adoue v. Wettermark*, *supra*. See "*Partnership*," *Dec. Dig. (Key No.)* § 220; *Cent. Dig.* §§ 455, 456.

<sup>47</sup> Section 3977, Code 1897.

<sup>48</sup> Civ. Code Prac. § 660.

<sup>49</sup> Executions, §§ 53, 54, Birdseye's Rev. St. (3d Ed.).

remedy by execution is abolished entirely in Georgia, and a garnishment process substituted in its stead, under which, after service of process and answer by the firm, the question of the interest of the debtor partner is submitted to a jury.<sup>50</sup> In England, due to the suggestion and advice of Lord Lindley,<sup>51</sup> a provision has been placed in the Partnership Act<sup>52</sup> which provides that, "after the commencement of this act a writ of execution shall not issue against any partnership property except on a judgment against the firm." In the place of the writ of execution, the separate creditor can obtain an order charging the interest of the debtor partner with the payment of the judgment. The charge may be enforced by the appointment of a receiver or by a sale of the partner's interest. The other partners may on such a sale buy the interest of the debtor partner,<sup>53</sup> or they may at their option treat the suffering by the debtor partner of his share to be charged as dissolving the firm.<sup>54</sup>

#### SAME—GARNISHMENT OF PARTNERSHIP DEBTORS

141. Debts due a partnership cannot be garnished in the hands of a third person in a suit against one partner for his individual indebtedness. Some jurisdictions permit tangible assets of the partnership in the hands of a third person to be garnished in such case, however; it being held, as on execution, that the interest of the debtor partner only is thereby reached.

<sup>50</sup> *Armand v. Burrum*, 69 Ga. 758; *Anderson v. Cheney*, 51 Ga. 372; *Branch v. Adam*, 51 Ga. 113; *WILLIS v. HENDERSON*, 43 Ga. 325; *Patterson v. Trumbull*, 40 Ga. 104; Code 1895, §§ 2661, 4705-4729. See "*Partnership*," *Dec. Dig. (Key No.)* § 220; *Cent. Dig.* § 452.

<sup>51</sup> Pollock's Digest of the Law of Partnership (8th Ed.) p. 77.

<sup>52</sup> Partnership Act, § 23, (1).

<sup>53</sup> Partnership Act, § 23, (2) (3).

<sup>54</sup> Partnership Act, § 33, (2).

*Debts*

It is usually held that a debt due a partnership cannot be garnished in the hands of a third person in a suit against one of the partners on an individual debt. The reasons for this holding are plainly indicated in *Johnson v. King*,<sup>55</sup> where it was said: "The question in this case is whether an execution creditor of one member of a partnership is entitled to a judgment, in a garnishment proceeding, against a debtor to such partnership. This question we decide in the negative. Such debt belongs to, and is assets of, the partnership, primarily liable to the satisfaction of partnership debts. If a judgment were given at law upon the garnishment proceeding against the debtor to the partnership, to satisfy the separate liability of one of the partners, it would unjustly abstract a portion of the fund primarily belonging to the objects and purposes and creditors of the concern; and in such garnishment nothing can be done but to give or refuse the judgment. The court has no power to impound the debt, until by the adjustment of all the partnership affairs it shall appear whether the separate debtor of the executive creditor has any, and what, interest in the general surplus, or in the particular debts so impounded. Such proceeding cannot take place at law."<sup>56</sup>

<sup>55</sup> *JOHNSON v. KING*, 6 Humph. (Tenn.) 233; *Stone v. Dowling*, 119 Mich. 476, 78 N. W. 549; *Raley v. Smith* (Tex. Civ. App.) 73 S. W. 54. See "*Partnership*," *Cent. Dig.* §§ 383-400; "*Garnishment*," *Dec. Dig.* (Key No.) § 62; *Cent. Dig.* §§ 120-125.

<sup>56</sup> *PEOPLE'S BANK v. SHRYOCK*, 48 Md. 427, 30 Am. Rep. 476, *Gilmore, Cas. Partnership*, 513; *Lyndon v. Gorham*, Fed. Cas. No. 8,640; *Ripley v. People's Sav. Bank*, 18 Ill. App. 430; *Trickett v. Moore*, 34 Kan. 755, 10 Pac. 147; *Thomas v. Lusk*, 13 La. Ann. 277; *Stillings v. Young*, 161 Mass. 287, 37 N. E. 175; *Upham v. Naylor*, 9 Mass. 490; *Hawes v. Inhabitants of Waltham*, 18 Pick. (Mass.) 451; *Dawson v. Iron Range & H. B. Ry. Co.*, 97 Mich. 33, 56 N. W. 106; *Markham v. Gehan*, 42 Mich. 74, 3 N. W. 262; *Sheedy v. Second Nat. Bank*, 62 Mo. 17, 21 Am. Rep. 407; *Pullis v. Fox*, 37 Mo. App. 592; *Barry v. Fisher*, 39 How. Prac. (N. Y.) 521; *Myers v. Smith*, 29 Ohio St. 120; *JOHNSON v. KING*, 6 Humph. (Tenn.) 233; *Bartlett v. Woodward*, 46 Vt. 100; *Towne v. Leach*, 32 Vt. 747; *Singer v. Townsend*, 53 Wis. 126, 10 N. W. 365. See "*Garnishment*," *Dec. Dig.* (Key No.) § 62; *Cent. Dig.* §§ 120-125; "*Partnership*," *Cent. Dig.* §§ 383-400.

*Tangible Assets*

If, however, it is sought to reach tangible assets of the partnership in the hands of the garnishee, some courts, even those that deny that a debt can be garnished, hold that this can be done. In an Ohio case it was said: "We do not assent to the doctrine laid down by the court that partnership demands can be garnished for the separate debt of one of the partners. \* \* \* Tangible property of the firm stands on a different footing, and we intend in no degree to qualify the recognized right of the separate creditors to levy on the interest of one of the partners in such property."<sup>57</sup> The distinction between the case of the debt and the case of tangible property is that the tangible property may be treated in garnishee proceedings as on execution; the partnership interest being considered as still existing. A debt cannot be so treated. All the court can do is to order the debt paid, and this will result in the use of the firm assets to pay a partner's separate debt.<sup>58</sup> If the firm is dissolved and the accounts are settled, the interest of each partner becomes certain, and in such case the debt may be garnished.<sup>59</sup> And it is held, in some jurisdictions, that if a firm is dissolved by the death of one partner, a firm debtor may be garnished on a claim against the survivor,<sup>60</sup> at least in the absence of a showing that the debt was needed to pay the firm debts, and of a claim by the personal representative of the deceased partner.<sup>61</sup>

<sup>57</sup> *Myers v. Smith*, 29 Ohio St. 120, 124, 126, citing *Nixon v. Nash*, 12 Ohio St. 648, 80 Am. Dec. 390. See "*Garnishment*," *Dec. Dig. (Key No.)* § 62; *Cent. Dig.* §§ 120-125; "*Partnership*," *Cent. Dig.* §§ 383-400.

<sup>58</sup> *Winston v. Ewing*, 1 Ala. 129, 34 Am. Dec. 768; *Trickett v. Moore*, 34 Kan. 755, 10 Pac. 147. See "*Garnishment*," *Dec. Dig. (Key No.)* § 62; *Cent. Dig.* §§ 120-125; "*Partnership*," *Cent. Dig.* §§ 383-400.

<sup>59</sup> *Harlan v. Moriarty*, 2 G. Greene (Iowa) 486; *Birtwhistle v. Woodward*, 95 Mo. 113, 7 S. W. 465. See "*Garnishment*," *Dec. Dig. (Key No.)* § 62; *Cent. Dig.* §§ 120-125; "*Partnership*," *Cent. Dig.* §§ 383-400.

<sup>60</sup> *Berry v. Harris*, 22 Md. 30, 85 Am. Dec. 639; *Knox v. Schepler*, 2 Hill, Law (S. C.) 595. See "*Garnishment*," *Dec. Dig. (Key No.)* § 62; *Cent. Dig.* §§ 120-125; "*Partnership*," *Cent. Dig.* §§ 383-400.

<sup>61</sup> *Thompson v. Lewis*, 34 Me. 167. See "*Garnishment*," *Dec. Dig.*

## REMEDIES IN EQUITY—INSOLVENCY OR BANKRUPTCY OF FIRM

142. A court of equity may acquire jurisdiction of the affairs of a partnership and of its members either by an assignment in trust by the partners for the benefit of creditors, or by a petition in insolvency, or by a bill for the adjustment of the affairs of an insolvent partnership. Whenever equity thus acquires jurisdiction, it distributes the assets of the partnership and of its members according to rules which produce essentially different results from those obtainable at law. Such rules of distribution will be considered under the following heads:

- (a) Firm Creditors Against the Firm Estate (*ubi supra*).
- (b) Separate Creditors Against the Firm Estate (p. 426).
- (c) Partners Against the Firm Estate (p. 427).
- (d) Separate Creditors Against the Separate Estates (p. 431).
- (e) Firm Creditors Against the Separate Estates (p. 437).
- (f) Partner Against the Estate of a Copartner (p. 444).
- (g) Rights of Secured Creditors (p. 446).
- (h) Right of Joint and Several Creditors—Double Proof (p. 450).
- (i) Insolvency or Bankruptcy of a Partner (p. 453).
- (j) Rights Against Estate of Deceased Partner (p. 457).

## SAME—FIRM CREDITORS AGAINST THE FIRM ESTATE

143. Firm creditors are entitled to priority of payment out of the firm estate, except—

EXCEPTION: (a) Where there is a dormant partner, but no ostensible firm.

### *Priority of Firm Creditors in Firm Property*

Every partner is deemed to have agreed, on entering into a partnership, that the firm property shall be used in payment of the firm debts in preference to those of any of the

partners. It is not necessary that this agreement should be expressly stated, because it is implied from the very existence of the partnership. It is, moreover, an agreement that equity will specifically enforce in favor of each partner, either by distributing the firm property to firm creditors, if it is in the hands of a court of equity for distribution, or by preventing the separate creditors from taking it on execution, if it is not.<sup>62</sup> This is said to give each partner an equitable lien on the assets of the firm. This lien arises out of the agreement of the partners, and gives no direct rights in the firm property to the firm creditors. Yet if the firm property is in a court of equity for distribution, the firm creditors can take advantage of the rights of the partners, and can insist that their claims shall be satisfied out of the assets of the partnership before those of the separate creditors.<sup>63</sup> Since this right of the firm creditors is based upon the right of the partners, and since that right is founded upon an agreement of the partners, the preference of the firm creditors may be lost by an agreement among the partners whereby each releases the right he has against the other.<sup>64</sup> In actual practice such a release is most frequently accomplished by means of a transfer by one partner of his interest in the partnership to the other.<sup>65</sup> If such a transfer is made, the property of the partnership becomes that of

(*Key No.*) § 62; *Cent. Dig.* §§ 120-125; "*Partnership*," *Cent. Dig.* §§ 383-400.

<sup>62</sup> *PLACE v. SWEETZER*, 16 Ohio, 142, Gilmore, *Cas. Partnership*, 511. See "*Partnership*," *Dec. Dig.* (*Key No.*) §§ 178-183, 220; *Cent. Dig.* §§ 310-336, 462, 463.

<sup>63</sup> *CASE v. BEAUREGARD*, 99 U. S. 119, 25 L. Ed. 370, Gilmore, *Cas. Partnership*, 226; *Lacey v. Cowan*, 162 Ala. 546, 50 South. 281. It should be noted that there is a conflict of authority as to whether or not firm creditors can insist upon a distribution to them in preference to joint creditors who are not firm creditors. See chapter IV, § 71, p. 224, *Partnership Liability and Joint Liability*. See "*Partnership*," *Dec. Dig.* (*Key No.*) §§ 178-183, 220; *Cent. Dig.* §§ 310-336, 462, 463.

<sup>64</sup> *CASE v. BEAUREGARD*, 99 U. S. 119, 25 L. Ed. 370, Gilmore, *Cas. Partnership*, 226. See chapter III, § 59, p. 181. See "*Partnership*," *Dec. Dig.* (*Key No.*) § 178; *Cent. Dig.* §§ 312, 319.

<sup>65</sup> *Ex parte RUFFIN*, 6 Ves. 119, Gilmore, *Cas. Partnership*, 217. See "*Partnership*," *Dec. Dig.* (*Key No.*) §§ 178, 183; *Cent. Dig.* §§ 312, 319, 324-327.

the separate partner, and becomes liable for his debts. Such a transfer must, however, be valid under the statute relating to fraudulent conveyances; for, while firm creditors may not complain of the loss of their preference, the statute is as applicable to conveyances made by a partnership as to those made by an individual.<sup>66</sup>

*Same—Exception—Dormant Partners*

One exception must be noted to the right of a partner to have the firm assets applied to firm debts. If a partner conceals his existence from the public, permitting his partner to appear before the public and use the firm property as a separate trader, he cannot complain if that property is taken on execution by the separate creditors.<sup>67</sup> By his conduct he has induced them to rely on the credit of the ostensible partner, part of which credit was due to the possession and apparent ownership of the partnership property, and he has estopped himself to deny that ownership. Since the dormant partner cannot complain if the property of the firm in the hands of the ostensible partner is taken by his separate creditors, it follows that the firm creditors cannot.<sup>68</sup> Nor can it be said that it is inequitable to deprive them of their advantage in such a case because of the fault of the dormant partner. They did not contract on the faith of such a preference. They expected to compete with the separate creditors at the time they made their contract, and equity will not aid them merely because they have succeeded in discovering the existence of a dormant partner.<sup>69</sup>

<sup>66</sup> See chapter III, §§ 56-64, pp. 176-203, on the Transfer of Partnership Property.

<sup>67</sup> *Cammack v. Johnson*, 2 N. J. Eq. 163; *Callender v. Robinson*, 96 Pa. 454. See "Partnership," *Dec. Dig. (Key No.)* § 178; *Cent. Dig.* §§ 313, 444.

<sup>68</sup> *French v. Chase*, 6 Me. 166; *LORD v. BALDWIN*, 6 Pick. (Mass.) 348. See "Partnership," *Dec. Dig. (Key No.)* § 178; *Cent. Dig.* §§ 313, 444.

<sup>69</sup> See, further, *Gumbel v. Koon*, 59 Miss. 264, for a partnership case construing a statute making property in the hands of an ostensible separate trader subject to the demands of his creditors as though it were his own property. Compare with the subject of reputed ownership and assets by estoppel, post, pp. 435-437. See "Partnership," *Dec. Dig. (Key No.)* § 178; *Cent. Dig.* §§ 313, 444.

### **SAME—SEPARATE CREDITORS AGAINST THE FIRM ESTATE**

- 144.** The separate creditors are not entitled to payment out of the firm estate until the firm creditors have been paid and until the liens of the other partners are discharged.

In distributing the assets of a firm, the debts of the firm which are due to those not members of it are first paid. Then the debts which are due to each partner on accounts other than the capital account are satisfied. Each partner is then repaid the capital which he has put into the firm. The residue, if any, is then distributed among the members of the partnership according to the terms of the partnership agreement.<sup>70</sup> The partner's share in the assets is derived from one or all of these three sources: From debts due him, from his share of the capital, or from the share in the surplus which he is entitled to by the partnership agreement. It is out of this share thus coming to a partner that his individual creditors are paid. Hence they are postponed, in the distribution of the assets of the partnership, to the equities of its members. Not until the accounts of the firm have been settled, both as between the firm and its creditors, and as between the partners themselves, are the creditors of the partners entitled to any part of the partnership assets.<sup>71</sup>

<sup>70</sup> *Hyre v. Lambert*, 37 W. Va. 26, 16 S. E. 446. See "Partnership," *Dec. Dig. (Key No.)* §§ 178-183; *Cent. Dig.* §§ 310-336.

<sup>71</sup> *McMillan v. Hadley*, 78 Ind. 590; *WALTER v. HERMAN*, 110 Ky. 800, 62 S. W. 857, 23 Ky. Law Rep. 741, *Gillmore, Cas. Partnership*, 575; *Tappan v. Blaisdell*, 5 N. H. 190; *Standish v. Babcock*, 52 N. J. Eq. 628, 29 Atl. 327; *Buchan v. Sumner*, 2 Barb. Ch. (N. Y.) 165, 47 Am. Dec. 305; *Fleming v. Billings*, 9 Rich. Eq. (S. C.) 149. See "Partnership," *Dec. Dig. (Key No.)* §§ 178-183; *Cent. Dig.* §§ 310-336.

**SAME—PARTNERS AGAINST THE FIRM ESTATE**

145. As firm creditors are the creditors of each member of a firm, a partner cannot prove against the firm estate in competition with firm creditors, for he would thus be competing with his own creditors.

**EXCEPTIONS:**

- (a) Where there has been a fraudulent conversion of his separate estate to the use of the firm.
- (b) Where as surety for the firm his individual property has been applied by a firm creditor as collateral security.
- (c) Where he carries on a distinct trade in respect to which the firm has become his debtor.
- (d) Where he has been discharged in bankruptcy, or otherwise, from his firm liability, he may prove any valid claim which he may thereafter hold against the firm estate.
- (e) A purchaser in good faith for value of a partner's claim against the firm may prove it against the firm estate.

***Partner Cannot Compete With Firm Creditors***

Since a partner is liable for the debts of the partnership, it is obviously unjust for him to compete with the firm creditors in the distribution of the firm assets. Inasmuch as they are the firm creditors, they are his creditors; and if he should prove against the partnership a debt due him from the partnership, he would, if it were paid to him, simply be transferring a sum from one fund to another, against both of which the firm creditors had a claim.<sup>72</sup> Hence it

<sup>72</sup> *Wallerstein v. Ervin*, 112 Fed. 124, 50 C. O. A. 129; *Coster's Ex'rs v. Bank of Georgia*, 24 Ala. 37; *Capital Food Co. v. Globe Coal Co. (Iowa)* 116 N. W. 803; *Wilkerson v. Tichenor*, 62 S. W. 870, 23 Ky. Law Rep. 244; *Conkling v. Washington University of Maryland*, 2 Md. Ch. 497; *Ross v. Carson*, 32 Mo. App. 148; *Lawson v. Dunn*, 66 N. J. Eq. 90, 57 Atl. 415; *Roop v. Herron*, 15 Neb. 73, 17 N. W. 353; *In re Rieser*, 19 Hun (N. Y.) 202; *Zell's Appeal*, 111 Pa. 532, 6 Atl. 107; *Colwell v. Weybosset Nat. Bank*, 16 R. I. 288,

has long been the rule in English bankruptcy cases that the partner who has a claim against the firm shall be postponed to the firm creditors generally.<sup>73</sup> The same rule seems to be recognized under the United States Bankruptcy Act of 1898; for, though it permits the proof by the partner of his claim against the estate, it also empowers the court to marshal the assets of the partnership and the separate estate of the partner so as to secure an equitable distribution of such assets.<sup>74</sup>

*Exception—Fraudulent Conversion*

An exception to the general rule, which prevents a partner from proving against the partnership estate, occurs where the property of a partner has been fraudulently or tortiously taken by the partnership and added to the firm assets. In such a case, though, as stated before, the property of the partnership is, if the partner is permitted to prove against the partnership estate, merely transferred from one fund which is liable to another which is also liable, the courts permit the defrauded partner to compete with the firm creditors. In the case where he has become a contract creditor of the partnership, he has consented that the assets of the firm should thereby be increased; where his property has been added to that of the firm by means of the wrongful conduct of his partners, he has not. In such a case the courts will not postpone his claim to that of the firm creditors.<sup>75</sup>

15 Atl. 80, 17 Atl. 913; GIBBS v. HUMPHREY, 91 Wls. 111, 64 N. W. 750. See "Partnership," Dec. Dig. (Key No.) §§ 182, 300; Cent. Dig. §§ 318, 695.

<sup>73</sup> Ex parte SILLITOE, 1 Glyn & J. 374, Gilmore, Cas. Partnership, 569. See "Bankruptcy," Dec. Dig. (Key No.) § 351; Cent. Dig. §§ 563, 564.

<sup>74</sup> Bankruptcy Act July 1, 1898, c. 541, § 5, 30 Stat. 547 (U. S. Comp. St. 1901, p. 3424); In re Denning (D. C.) 114 Fed. 219; Rush v. Lake, 10 Am. Bankr. Rep. 455, 122 Fed. 561, 58 C. C. A. 447. See "Bankruptcy," Dec. Dig. (Key No.) § 351; Cent. Dig. §§ 563, 564.

<sup>75</sup> Though the exception is undoubtedly well recognized, cases for its application have been rare. Most of the cases where its existence has been admitted have been cases where the firm was allowed or attempted to prove against the estate of the separate partner. READ v. BAILEY, L. R. 3 App. Cas. 94. See, also, Ex parte Har-

*Same—Partner as Surety*

The United States bankruptcy courts have also established the rule that, if a partnership creditor holds the securities of an individual partner and after bankruptcy realizes upon them, the separate creditors of the partner whose estate has thus been reduced will be allowed to receive from the joint estate a sum equal to the dividend upon the securities.<sup>76</sup>

*Same—Trade Debts*

It was once the rule in England that in the distribution of assets of a partnership two firms could prove against each other the same as other creditors composed of the same persons. The same rule was, of course, applied in the case of a firm having a debtor or creditor partner. The rule was, however, abolished over a century ago, and in its stead was adopted the rule which has already been given, by which a partner is not allowed to prove against the firm estate in competition with firm creditors.<sup>77</sup> Several exceptions were, however, subsequently established, one of which has been given. Another was that if a firm had within it a partner who was a separate trader, or if it contained within its membership persons who made up another firm which was a trading firm, trade accounts between the firm and such a partner or between the first firm and the second

ris, 2 Ves. & B. 210; *Lodge v. Feudal*, 1 Ves. Jr. 166. In the United States the exception has been repeatedly stated to exist. "The rule \* \* \* is to be received with this important limitation: That it does not apply in case, either where the effects obtained, creating the debt, were taken from the separate estate to augment the joint estate, or from the joint estate to augment the separate fraudulently, or under circumstances from which fraud may be inferred, or under which it would be implied." *RODGERS v. MERANDA*, 7 Ohio St. 180, Gilmore, Cas. Partnership, 528, 537; *Matter of Rieser*, 19 Hun (N. Y.) 202, 203. See "*Partnership*," *Dec. Dig. (Key No.)* § 182; *Cent. Dig.* § 318.

<sup>76</sup> In re FOOT, 12 N. B. R. 337, Fed. Cas. No. 4,906. See "*Bankruptcy*," *Dec. Dig. (Key No.)* §§ 323, 351; *Cent. Dig.* §§ 503, 505, 513, 563, 564; "*Partnership*," *Dec. Dig. (Key No.)* § 189; *Cent. Dig.* § 344.

<sup>77</sup> See the opinion of Lord Blackburn in *READ v. BAILEY*, L. R. 3 App. Cas. 94, 102. See "*Partnership*," *Dec. Dig. (Key No.)* § 182; *Cent. Dig.* § 318.

might be proved in competition with other creditors.<sup>78</sup> The reason for the exception does not clearly appear, but it probably was due to the extreme reluctance which the English courts have always felt toward doing anything which might tend to discourage and decrease trade and commerce.<sup>79</sup> The exception does not appear to be recognized in the United States. Yet if a partner in one firm is engaged in a separate business with another who is not a member of the first firm, such second firm can prove against the assets of the first with its creditors. In other words, a creditor of a firm is not deprived of his right in equity merely because he is a copartner with a member of the insolvent firm.<sup>80</sup>

*Same—Partner Discharged from Firm Liability*

Since a partner is not allowed to compete with firm creditors in the partnership assets because they are also his creditors, it follows that if he is for any reason discharged from liability on the firm obligations, as by reason of a discharge in bankruptcy, or by virtue of the statute of limitations, his disability is removed, and he can prove and share with other creditors.<sup>81</sup>

*Same—Purchaser in Good Faith*

It would seem that, if the debt of a partner is assigned by him for value and in good faith before the assets of the firm are in the hands of the court for distribution, it might well be held, and is generally held, that the assignee takes

<sup>78</sup> *Ex parte SILLITOE*, 1 Glyn & J. 374, Gilmore, Cas. Partnership, 569; *GIBBS v. HUMPHREY*, 91 Wis. 111, 64 N. W. 750. See "Partnership," *Dec. Dig. (Key No.)* § 182; *Cent. Dig.* § 318.

<sup>79</sup> See the opinions of Lords Eldon and Brougham in *Ex parte SILLITOE*, 1 Glyn & J. 374, Gilmore, Cas. Partnership, 569, and *Ex parte COOK*, Mon. 228, respectively. See "Partnership," *Dec. Dig. (Key No.)* § 182; *Cent. Dig.* § 318.

<sup>80</sup> *In re BUCKHAUSE*, 10 N. B. R. 206, Fed. Cas. No. 2,086, Gilmore, Cas. Partnership, 572. See, also, *COLE v. REYNOLDS*, 18 N. Y. 74; *Mangels v. Shaen*, 21 App. Div. 507, 48 N. Y. Supp. 526. See "Partnership," *Dec. Dig. (Key No.)* §§ 182, 190; *Cent. Dig.* §§ 318, 347.

<sup>81</sup> *Ex parte Atkins*, 1 Buck. 479; *Ex parte Smith*, L. R. 14 Q. B. D. 394. See "Partnership," *Dec. Dig. (Key No.)* § 182; *Cent. Dig.* § 318.

the debt free from the disability of the partner.<sup>82</sup> Still it has been held in some jurisdictions that the assignee of a partner's claim against the partnership takes the claim subject to the imperfections which existed in it when in the hands of the partner himself.<sup>83</sup>

### SAME—SEPARATE CREDITORS AGAINST THE SEPARATE ESTATES

**146.** The separate creditors of a partner are entitled to priority of payment out of the separate estate of that partner.

Having regard to the legal nature of firm obligations, the firm creditors should have a right to come against the estate of the individual partner. As pointed out in chapter IV<sup>84</sup> each partner is at law liable to the full extent of his separate property for the firm debts; and, as indicated in the first part of this chapter,<sup>85</sup> when a firm creditor has reduced his claim to judgment, he may seize the individual property on execution. When, however, a court of equity acquires jurisdiction, he suffers a restriction upon his rights. While the rule as stated in the black letter proposition above is well established,<sup>86</sup> there are cases holding con-

<sup>82</sup> *Frank v. Anderson*, 81 Tenn. 695. See "*Partnership*," *Dec. Dig. (Key No.)* § 182; *Cent. Dig.* § 318.

<sup>83</sup> *Simrall v. O'Bannons*, 46 Ky. 608. See "*Partnership*," *Dec. Dig. (Key No.)* § 182; *Cent. Dig.* § 318.

<sup>84</sup> See chapter IV, § 69 et seq., p. 217 et seq.

<sup>85</sup> See ante, § 139, p. 404.

<sup>86</sup> *In re Dunkerson*, 4 Bliss. 277, Fed. Cas. No. 4,158; *In re Estes* (D. C.) 3 Fed. 134; *Union Nat. Bank of Chicago v. Bank of Commerce of St. Louis*, 94 Ill. 271; *McIntire v. Yates*, 104 Ill. 491; *Miller v. Clarke*, 87 Iowa. 325; *Trustees of Catskill Bank v. Hooper*, 5 Gray (Mass.) 574; *BUSH v. CLARK*, 127 Mass. 111; *Nutting v. Ashcroft*, 101 Mass. 300; *Ault v. Bradley*, 191 Mo. 709, 90 S. W. 775; *MEECH v. ALLEN*, 17 N. Y. 300, 72 Am. Dec. 465; *Gilmore, Cas. Partnership*, 499; *Heckman v. Messinger*, 49 Pa. 465; *Lord v. Devendorf*, 54 Wis. 491, 11 N. W. 903, 41 Am. Rep. 58; *Ex parte COOK*, 2 P. Wms. 500. See "*Partnership*," *Dec. Dig. (Key No.)* §§ 186, 187; *Cent. Dig.* §§ 339, 340.

trary,<sup>87</sup> and there were periods in the development of the rule in England when the firm creditors were permitted to prove *pari passu* with the separate creditors against the separate estate of the partners. The history of the rule, and reasons for and against it, are reviewed in *Rodgers v. Meranda*.<sup>88</sup> In that case Bartley, C. J., says: "And this rule, which gives the partnership creditors a preference in the partnership effects, would seem to produce, in equity, a corresponding and correlative rule, giving a preference to the individual creditors of a partner in his separate property; so that partnership creditors can, in equity, only look to the surplus of the separate property of a partner, after the payment of his individual debts, and, on the other hand, the individual creditors of a partner can, in like manner, only claim distribution from the debtor's interest in the surplus of the joint fund after the satisfaction of the partnership creditors. The correctness of this rule, however,

<sup>87</sup> *Camp v. Grant*, 21 Conn. 41, 54 Am. Dec. 321; *Pearce v. Cooke*, 13 R. I. 184; *White v. Dougherty*, Mart. & Y. (Tenn.) 309, 17 Am. Dec. 802; *Bardwell v. Perry*, 19 Vt. 292, 47 Am. Dec. 687; *Ex parte Hodgson*, 2 Brown, Ch. 5. See "*Partnership*," *Dec. Dig. (Key No.)* §§ 186, 187, 247; *Cent. Dig.* §§ 339, 340, 525-528.

<sup>88</sup> *RODGERS v. MERANDA*, 7 Ohio St. 179, 181, Gilmore, Cas. Partnership, 528.

The rule is one of long standing in England, being recognized in the case of *Ex parte Crowder*, 2 Vern. 706, decided in 1715, and later followed in *Ex parte COOK*, 2 P. Williams, 500, and in *Ex parte Hunter*, 1 Atk. 228. Lord Thurlow apparently altered the rule so far as it extended to bankruptcy in the case of *Ex parte HODGSON*, 2 Brown, Ch. 5, decided in 1785. In this case he held that there was no distinction to be made between joint and separate creditors; each being entitled to share equally in a bankrupt partner's estate. A bill in equity of the separate creditors would apparently lie, however, to compel the joint creditors to first satisfy their claims out of the firm assets. The inconvenience of the resulting practice led Lord Loughborough, in *Ex parte ELTON*, 3 Ves. Jr. 238, decided in the year 1796, to restore the old rule in bankruptcy. Lord Eldon followed the same rule in *Chiswell v. Gray*, 9 Ves. 126, and it has ever since remained the law of England, applicable not alone in bankruptcy, but in equity generally, that in the distribution of the estate of insolvent partners the separate creditors are entitled to priority in the separate estate. See *RODGERS v. MERANDA*, *supra*. See "*Partnership*," *Dec. Dig. (Key No.)* §§ 186, 187; *Cent. Dig.* §§ 339, 340.

has been much controverted; and there has not been always a perfect concurrence in the reasons assigned for it by those courts which have adhered to it. By some it has been said to be an arbitrary rule, established from considerations of convenience; by others, that it rests on the basis that a primary liability attaches to the fund on which the credit was given—that in contracts with a partnership credit is given on the supposed responsibility of the firm, while in contracts with a partner as an individual reliance is supposed to be placed on his separate responsibility;<sup>88</sup> and, again, others have assigned as a reason for the rule that the joint estate is supposed to be benefited to the extent of every credit which is given to the firm, and that the separate estate is, in like manner, presumed to be enlarged by the debts contracted by the individual partner, and that there is, consequently, a clear equity in confining the creditors, as to preference, to each estate, respectively, which has been thus benefited by their transactions.<sup>89</sup> But these reasons are not entirely satisfactory. \* \* \*. What, then, is the true foundation of the rule which gives the individual creditor a preference over the partnership creditor in the distribution of the separate estate of a partner? To say that it is a rule of general equity, as has been sometimes said, is not a satisfactory solution of the difficulty; for the question is whether it be a rule of equity or not. In the distribution of the assets of insolvents, equality is equity; and to say that the rule which gives the individual creditor a preference over the partnership creditor in the separate estate of the partner is a rule of equality does not still rid the subject of difficulty. For, leaving the rule to stand which gives the preference to the joint creditors in the partnership property, and perfect equality between the joint and individual creditors is, perhaps, rarely attainable. That it is, however, more equal and just, as a general rule, than any other which can be devised, consistently with the preference to the partnership creditors in the joint es-

<sup>88</sup> 3 Kent, Comm. 65.

<sup>89</sup> *McCulloh v. Dashiell's Adm'r*, 1 Har. & G. (Md.) 96, 18 Am. Dec. 271. See "*Partnership*," *Dec. Dig. (Key No.)* §§ 186, 187; *Cent. Dig.* §§ 339, 340.

tate, cannot be successfully controverted. It originated as a consequence of the rule of priority of partnership creditors in the joint estate, and, for the purpose of justice, became necessary as a correlative rule. With what semblance of equity could one class of creditors, in preference to the rest, be exclusively entitled to the partnership fund, and, concurrently with the rest, entitled to the separate estate of each partner? The joint creditors are no more meritorious than the separate creditors; and it frequently happens that the separate debts are contracted to raise means to carry on the partnership business. Independent of this rule, the joint creditors have, as a general thing, a great advantage over the separate creditors. Besides being exclusively entitled to the partnership fund, they take their distributive shares in the surplus of the separate estate of each of the several partners after the payment of the separate creditors of each. It is a rule of equity that, where one creditor is in a situation to have two or more distinct securities or funds to rely on, the court will not allow him, neglecting his other funds, to attach himself to one of the funds to the prejudice of those who have a claim upon that and no other to depend on."<sup>91</sup>

<sup>91</sup> "The theories which have been suggested to account for the course of distribution in equity do not go to the source of the change, and explain the cause which brought about the departure from the common-law system. The notion of credit, that, as the joint creditors relied upon firm assets, the separate creditors looked to the separate estates for payment, is an assumption. It contradicts the experience which imputes to every man a knowledge of the law. The credit will depend upon the estate which the debtor had. The partners have joint and separate estates, which are both subject to firm debts. The credit would, of course, be given in reliance upon both estates. The partner has a resulting interest in the firm after all its debts are paid, and his separate estate, which is also subject to the firm debts. His creditor could expect nothing from the partner's share until the firm creditors had been satisfied, and he could only share the separate estate with them unless insolvency supervened, which would give him a paramount title to the separate fund. The credit given to a debtor is not the cause of his estate, but a consequence of his possessing the means to pay the debt." J. PARR. PARTN. 191.

*Reputed Ownership*

It may be, however, that the separate creditor will in certain situations be prevented from asserting the right which he ordinarily has. For instance, it may be that the doctrine of reputed ownership will give the creditor of an ostensible firm a priority in the distribution in bankruptcy of the goods used by such firm in its business, even though such property was, in fact, the property of one only of the ostensible partners.

It has long been the policy of the English bankruptcy laws, with a view, doubtless, to the benefit of trade, to make goods used by the bankrupt in his trade, with the consent of the true owner, in such manner as to become the reputed owner of them, liable for his debts.<sup>92</sup> The purpose of the statutory provisions making property liable for the debts of the reputed owner is to prevent persons from obtaining credit by being permitted to display as their own property which belongs to another. Applying the doctrine of reputed ownership to the case of an ostensible partnership, it is held that, if an ostensible partner permits his property to be used by the ostensible firm in such a manner that it is reputed to be firm property, such property becomes liable for the firm debts.<sup>93</sup> It should be noted that the doctrine of reputed ownership is based upon statute, and, while there are expressions in some of the English partnership cases indicating that they are not decided upon the ground of reputed ownership,<sup>94</sup> it seems that they are more properly decided on that

<sup>92</sup> Bankruptcy Act 1883, § 44. (III), in enumerating the bankrupt's property available for payment of debts, includes the following: "All goods being, at the commencement of the bankruptcy, in the possession, order, or disposition of the bankrupt, in his trade or business, by the consent and permission of the true owner, under such circumstances that he is the reputed owner thereof; provided that things in action other than debts due or growing due to the bankrupt in the course of his trade or business, shall not be deemed goods within the meaning of this section."

<sup>93</sup> *Rowland v. Crankshaw*, 1 Ch. 41; *Ex parte Hayman*, 8 Ch. Div. 77; *In re Watson & Co.* (1904) 2 Ch. 753; *Shannon v. Mason*, [1899] 2 Q. B. 679. See "*Partnership*," *Dec. Dig. (Key No.)* §§ 185-189; *Cent. Dig.* §§ 337-348.

<sup>94</sup> *Rowland v. Crankshaw*, 1 Ch. 41. See "*Partnership*," *Dec. Dig. (Key No.)* §§ 185-189; *Cent. Dig.* §§ 337-348.

ground than any other. Thus, it was said by Thesiger, L. J., in *Ex parte Hayman*:<sup>88</sup> "If the consequence that the stock in trade is to be held to be joint property, where there is an ostensible partnership, is merely an offshoot of the doctrine of reputed ownership, then I can well understand that in such a case the rights of the separate creditors should be barred, and that they should not be entitled to prove in competition with the joint creditors. But, if this result is supposed to flow from the doctrine of ostensible partnership per se, then I must say for myself that I cannot see why in such a case the rights of the separate creditors should be any less than the rights of the joint creditors. The law relating to ostensible partnership is founded upon the doctrine of estoppel, and although the doctrine of estoppel might be perfectly good as between those who contract with the joint creditors and the creditors themselves, I do not see why in the event of bankruptcy that estoppel should apply to the separate creditors, whose rights before bankruptcy stand very much in the same position as those of the joint creditors."

*Partnership Assets by Estoppel*

Nevertheless, in this country, in the absence of a statutory doctrine of reputed ownership, it has been held in some jurisdictions that the property of an ostensible partner used in the partnership business was liable for the partnership debts on the ground of equitable estoppel. A leading case on this subject is *Thayer v. Humphrey*,<sup>89</sup> where Marshall, J., in delivering the opinion, said: "The doctrine that estops B. from saying that he is not a partner of A. at the suit of the creditors of the ostensible firm should estop A. from holding that the property is his individual property, to the prejudice of those who dealt with the firm as a firm in fact, and should estop the creditors of the ostensible firm, in the case of the bankruptcy of such firm, from resorting primar-

<sup>88</sup> 8 Ch. Div. 11. See "*Partnership*," *Dec. Dig.* (Key No.) §§ 185-189; *Cent. Dig.* §§ 337-348.

<sup>89</sup> *THAYER v. HUMPHREY*, 91 Wis. 276, 64 N. W. 1007, 30 L. R. A. 549, 51 Am. St. Rep. 887, *Gillmore, Cas. Partnership*, 546. See "*Partnership*," *Dec. Dig.* (Key No.) §§ 177-189; *Cent. Dig.* §§ 310-348.

ily to the individual property of the members of such firm; in short, should work effectually to compel liquidation in all respects the same as if the members of such firm were just what they seem to be. This is what the doctrine of estoppel is for; that is what equity is supposed to accomplish—to prevent fraud and promote justice between man and man in the administration of human affairs.”<sup>97</sup> The difficulty with this view is that it loses sight of the fact that the estoppel of an ostensible partner is a personal one.<sup>98</sup> He is estopped to deny that he is personally liable for the firm debts and a judgment against him may be obtained upon them. It is a different thing, however, to hold that this estoppel so binds his individual property as to prevent his individual creditors from claiming it as his. They, ordinarily, have done nothing which should prevent them from establishing the truth and insisting upon it.<sup>99</sup>

#### SAME—FIRM CREDITORS AGAINST THE SEPARATE ESTATES

147. The firm creditors are not entitled to payment out of the separate estates until the separate creditors have been paid. But they may participate equally with the separate creditors in the distribution of the separate estates in the following cases:

##### EXCEPTIONS:

- (a) Where there is no joint estate nor living solvent partner.
- (b) Where there has been a fraudulent conversion of firm property to the use of the separate estates.
- (c) Where a partner has become indebted to the firm in respect to a separate trade carried on by him.

<sup>97</sup> See, also, *Adams & Co. v. Albert*, 155 N. Y. 356, 49 N. E. 929, 63 Am. St. Rep. 675. See “Partnership,” *Dec. Dig. (Key No.)* §§ 177-189; *Cent. Dig.* §§ 310-348.

<sup>98</sup> *BROADWAY NAT. BANK v. WOOD*, 165 Mass. 312, 43 N. E. 100; *SWANN v. SANBORN*, 4 Woods, 625, Fed. Cas. No. 13,675, Gilmore, Cas. Partnership, 557. See “Partnership,” *Dec. Dig. (Key No.)* §§ 177-189; *Cent. Dig.* §§ 310-336.

<sup>99</sup> See the dissent of Newman, J. (Pinney, J., concurring), in *THAYER v. HUMPHREY*, 91 Wis. 276, 64 N. W. 1007, 30 L. R. A.

*Firm Creditors Against Separate Estate*

As has just been pointed out, the separate creditors of a partner are entitled, in equity, to be paid out of the separate assets of the partner before the firm creditors receive anything. The same rule of distribution has been incorporated in the United States Bankruptcy Act of 1898.<sup>1</sup> In Kentucky a different rule has been established, however. By this rule the firm creditors are entitled to exhaust the firm estate, the separate creditors are then entitled to a dividend out of the separate estate equal to that already obtained by the firm creditors out of the firm estate, after which the firm creditors are entitled to share equally with the separate creditors in the remainder of the separate estate.<sup>2</sup> Whether firm creditors become creditors of a partner who purchases the firm property and agrees to pay the firm debts is a question on which the case is conflicting. In England and in some jurisdictions in the United States, such an arrangement does not make them separate creditors, unless they consent to it, or, knowing of it, deal with the continuing partner to the prejudice of the other partners.<sup>3</sup> In many jurisdictions in the United States, where

549, 51 Am. St. Rep. 887, Gilmore, Cas. Partnership, 546. See "*Partnership*," *Dec. Dig.* (Key No.) §§ 177-189; *Cent. Dig.* §§ 310-336.

<sup>1</sup> Bankruptcy Act July 1, 1898, c. 541, § 5f, 30 Stat. 548 (U. S. Comp. St. 1901, p. 3424).

<sup>2</sup> *Northern Bank of Kentucky v. Kelzer*, 2 Duv. 169; *Whitehead v. Chadwell's Adm'r*, 2 Duv. 432; *Fayette Nat. Bank of Lexington v. Kenney's Assignee*, 79 Ky. 133. See, also, *Civ. Code Ga.* 1895, § 2660; *Johnson v. Gordon*, 102 Ga. 350, 30 S. E. 507. The Kentucky rule has been thus described by the Supreme Court of Minnesota: "The original of this rule seems to be the rule adopted in Pennsylvania, in *Bell v. Newman*, 5 Serg. & R. 78, for the distribution of firm and individual assets, in a case where a surviving partner died, leaving both partnership separate creditors and firm and separate assets in the hands of his administrator. \* \* \* *Bell v. Newman* was practically overruled in *Black's Appeal*, 44 Pa. 503, and the equity rule adopted. The objections to the now discarded rule of Pennsylvania apply precisely to the Kentucky rule, which has not, so far as we are advised, been followed by any other court." *Start, C. J.*, in *HAWKINS v. MAHONEY*, 71 Minn. 155, 73 N. W. 720, *Gilmore, Cas. Partnership*, 558. See "*Partnership*," *Dec. Dig.* (Key No.) § 187; *Cent. Dig.* §§ 340-342.

<sup>3</sup> *Ex parte Freeman*, Buck. 471; *Ex parte Appleby*, 2 Deac. 482;

a right to sue on a promise for the benefit of a third person is recognized, the creditors of a firm become the creditors of an individual partner who assumes the firm debts, and as such they may prove in bankruptcy with his other separate creditors.<sup>4</sup>

*Exception—No Joint Estate nor Living Solvent Partner*

There is a well-established exception to the rule above stated, which is as follows: If there be no firm assets nor living solvent partner, the firm creditors may participate *pari passu* with the separate creditors in the distribution of the separate estate. The reason for the exception is to be found in the reason for the rule itself.<sup>5</sup> The reason usually given is this: "Where one creditor is in a situation to have two or more distinct securities or funds to rely on, the court will not allow him, neglecting his other funds, to attach himself to one of the funds to the prejudice of those who have a claim upon that and no other to depend on."<sup>6</sup> Therefore, if there be no firm assets nor living solvent partner, the firm creditors have no especial advantage over the separate creditors and should be permitted to share *pari passu* with them in the separate estate.<sup>7</sup>

Rouse v. Bradford Banking Co. (1894) A. C. 586; *Ex parte Jackson*, 1 Ves. Jr. 130; *Ex parte Peele*, 6 Ves. Jr. 601; *Ex parte Hitchcock*, 3 Deac. 507; *Wild v. Dean*, 3 Allen (Mass.) 579; *Bucklin v. Bucklin*, 97 Mass. 256; *Priesing v. Crampton*, 181 Mass. 492, 63 N. E. 936.

See chapter IV, §§ 77, 78, pp. 242-257. See "*Partnership*," *Dec. Dig. (Key No.)* § 187; *Cent. Dig.* §§ 340-342.

<sup>4</sup> *In re Long*, 9 N. B. R. 227, Fed. Cas. No. 8,476; *In re Rice*, 9 N. B. R. 373, Fed. Cas. No. 11,750; *In re Downing*, 3 N. B. R. 748, Fed. Cas. No. 4,044; *ARNOLD v. NICHOLS*, 64 N. Y. 117, *Gilmore, Cas. Partnership*, 328. See "*Bankruptcy*," *Dec. Dig. (Key No.)* §§ 309, 351; *Cent. Dig.* §§ 555-564.

<sup>5</sup> See pp. 432-434, ante, for general statement of reasons.

<sup>6</sup> *RODGERS v. MERANDA*, 7 Ohio St. 179, *Gilmore, Cas. Partnership*, 528. See "*Partnership*," *Dec. Dig. (Key No.)* §§ 186, 187, 247; *Cent. Dig.* §§ 339-342, 525-528.

<sup>7</sup> *Ex parte KENSINGTON*, 14 Ves. 447. See *Ex parte Pinkerton*, where proof was allowed, there being a solvent partner, who was, however, abroad and unlikely to return. *Ex parte Pinkerton*, 6 Ves. 814; *In re Knight*, 8 N. B. R. 436, 438, Fed. Cas. No. 7,880; *Ex parte Hayden*, 1 Bro. Ch. 398. See "*Partnership*," *Dec. Dig. (Key No.)* §§ 186, 187, 247; *Cent. Dig.* §§ 339-342, 525-528.

*Same—Joint or Firm Assets*

The rule that if there are firm assets the firm creditors shall not be permitted to participate with the separate creditors in the separate assets applies in England if there are any firm assets at all which come into the hands of the trustee in bankruptcy for distribution, even though the trustee is obliged to expend all of them in costs.<sup>8</sup> In the United States, however, it is generally held that the rule is only applicable in case there are distributable assets. If all of the assets possessed by an insolvent firm are absorbed by the expense of disposing of the same, the firm creditors may prove against the separate estate.<sup>9</sup> But if there are any assets for distribution, no matter how small they may be, the firm creditors are confined to them. This is true, even though those assets may result from the purchase by a separate creditor of a worthless claim against the firm,<sup>10</sup> or though they may have been produced by the estoppel of a reputed partner to deny that they are his.<sup>11</sup>

*Same—Living Solvent Partner*

Not only must there be no assets of the partnership, before a partnership creditor is permitted to share *pari passu* with the separate creditors, but there must be no living solvent partner. The reason is applicable to the entire rule. A solvent partner in this connection means one who has

<sup>8</sup> *Ex parte Kennedy*, 2 De Gex. M. & G. See, however, *Ex parte PEAKE*, 2 Rose, 54; *Ex parte HILL*, 2 Bos. & P. N. R. 191, note. See "*Partnership*," *Dec. Dig. (Key No.)* § 187; *Cent. Dig.* §§ 340, 342.

<sup>9</sup> *HARRIS v. PEABODY*, 73 Me. 262, Gilmore, Cas. Partnership, 541. "The net proceeds of the partnership property shall be appropriated to the payment of the partnership debts, and the net proceeds of the individual estate of each partner to the payment of his individual debts." Bankruptcy Law U. S. July 1, 1898, c. 541, § 5f, 30 Stat. 548 (U. S. Comp. St. 1901, p. 3424). See "*Partnership*," *Dec. Dig. (Key No.)* § 187; *Cent. Dig.* §§ 340, 342; "*Bankruptcy*," *Dec. Dig. (Key No.)* §§ 309, 351; *Cent. Dig.* §§ 555-564.

<sup>10</sup> *In re MARWICK*, Fed. Cas. No. 9,181, Gilmore, Cas. Partnership, 545. See "*Partnership*," *Dec. Dig. (Key No.)* § 187; *Cent. Dig.* §§ 340, 342.

<sup>11</sup> *THAYER v. HUMPHREY*, 91 Wis. 276, 64 N. W. 1007, 30 L. R. A. 549, 51 Am. St. Rep. 887, Gilmore, Cas. Partnership, 546. See "*Partnership*," *Dec. Dig. (Key No.)* §§ 178-189; *Cent. Dig.* §§ 310-348.

assets available for firm creditors; that is, a nonbankrupt partner. Mere insolvency in the sense of financial embarrassment is not sufficient, for in legal contemplation the firm creditors still have a remedy against him.<sup>12</sup> The solvent partner must be living. If there are no assets and the other partners are dead, even if they have left solvent estates, the firm creditors will be permitted to participate with the separate creditors of the living bankrupt partner.<sup>13</sup>

*Fraudulent Conversion by Partners of Firm Property*

An exception in favor of separate creditors was noted in discussing the rights of the separate creditors against the firm estate, where the property of the partner had been wrongfully appropriated to the use of the firm. Conversely, where one partner has fraudulently appropriated firm property to his own use, the firm creditors can on a demand based upon such conversion compete with the separate creditors.<sup>14</sup> An excellent statement of the reason for the exception is to be found in the opinion of Lord Cairns in *Read v. Bailey*.<sup>15</sup>

<sup>12</sup> *McCulloh v. Dashiell's Adm'r*, 1 Har. & G. (Md.) 96, 18 Am. Dec. 271; *Conrader v. Cohen*, 131 Fed. 801, 58 C. C. A. 249; *In re MARWICK*, 2 Ware, 233, Fed. Cas. No. 9,181, Gilmore, Cas. Partnership, 545; *Ex parte Bauerman*, 3 Dea. 476, 486. See "*Partnership*," *Dec. Dig.* (Key No.) §§ 187, 247; *Cent. Dig.* §§ 340, 342, 525-528.

<sup>13</sup> *Ex parte Bauerman*, 3 Dea. 476. See "*Partnership*," *Dec. Dig.* (Key No.) §§ 187, 247; *Cent. Dig.* §§ 340, 342, 525-528.

<sup>14</sup> *Ex parte Smith*, 1 Glyn & J. 741; *Ex parte Watkins*, Mont. & M. 57; *Ex parte LODGE*, 1 Ves. Jr. 166; *McELROY v. ALLFREE*, 131 Iowa, 518, 108 N. W. 119, Gilmore, Cas. Partnership, 573; *RODGERS v. MERANDA*, 7 Ohio St. 180, Gilmore, Cas. Partnership, 528. See "*Partnership*," *Dec. Dig.* (Key No.) §§ 186-188; *Cent. Dig.* §§ 339-342.

<sup>15</sup> *READ v. BAILEY*, 3 App. Cas. 94. "So long as you have distinct estates, so long as you keep distinct the joint estate and the separate estate, if you allow the firm, the partnership concern, to make contracts with its separate members, and to stand upon those contracts as affording a ground of proof as against the separate creditors, you run the risk, to say the least—perhaps I might say you have the certainty—that contracts will be made between the firm and the individual members which in effect will defeat the rights of the creditors of the individual members. But where you have a conversion of the property of the firm to the purposes of the individual members, not by way of contract or agreement with the firm, not within the knowledge or the cognizance of the firm, but by

*Trade Debts*

Trade debts, also, which may be proved by a partner against a firm, at least in England, may there be proved by the firm against a partner in competition with the creditors of the partner. In the bankruptcy of a partner, the firm to which he belongs is treated as an ordinary creditor with respect to those debts which have accrued in the regular course of trade between the firm and such partner.<sup>16</sup> In the United States it is doubtful whether this exception is allowed; the courts not being inclined to favor exceptions to the general rule, inasmuch as they tend to embarrassment in the distribution of the assets within their control.<sup>17</sup>

a fraud of an individual partner, to which the firm is no assenting party, of which its other members are not cognizant and cannot be cognizant, there the reason for the rule ceases, and the firm whose assets have thus been fraudulently abstracted ought not to suffer, and ought not to be deprived of the right to proceed against the separate estate in competition with any other claimants. Whether the separate estate has in the result been increased or not, whether at the time of the proof it is larger than it otherwise would have been or not, is a matter which does not concern the application of the rule, and it is sufficient that at one time the separate estate was increased, when the property was thus fraudulently converted and taken for the purpose of one partner." See "*Partnership*," *Dec. Dig. (Key No.)* §§ 186-188; *Cent. Dig.* §§ 339-342.

<sup>16</sup> Ex parte Hesham, 1 Rose, 146; Ex parte Castill, 2 Glyn & J. 124; Ex parte ST. BARBE, 11 Ves. 413. See "*Bankruptcy*," *Dec. Dig. (Key No.)* §§ 309, 351; *Cent. Dig.* §§ 555-564.

<sup>17</sup> In re Lane, 10 N. B. R. 135, Fed. Cas. No. 8,044. See, also, GIBBS v. HUMPHREY, 91 Wis. 111, 64 N. W. 750; Somerset Pottery Works v. Minot, 10 Cush. (Mass.) 592, 598, 601. In this case the court said: "We are aware that in the English courts there have been cases where, under the peculiar equities of the case, the courts of equity have allowed a demand, or debt for goods sold by a firm to one partner, to carry on his separate business, to be allowed as against his separate estate. There has been, however, great fluctuation in the opinions of the English chancellors on this subject, and it is at this moment somewhat uncertain to what extent this exception to the general rule is allowed. Any exception of this kind is full of embarrassment and difficulty, and is in conflict with that simple and direct mode of distribution of joint and separate assets, which St. 1838, c. 163, has provided. \* \* \* Indeed, this whole matter of exceptions to the general rule of distribution of joint and separate assets, as we have already intimated in considering another point, is of very questionable expediency,

*Legal Priority Against Separate Property*

Though separate creditors are given priority in equity to the creditors of the firm in the distribution of the estate of a partner, "those courts have never assumed to exercise the power of setting aside or in any way interfering with an absolute right of priority obtained at law. \* \* \* There is no doubt that at law the judgment for a partnership debt attaches and becomes a lien upon the real estate of each of the partners, with the same effect as if such judgment were for the separate debt of such partner. \* \* \* The principle that the separate property of an individual partner is to be first applied to the payment of his separate debts has \* \* \* never been held to give priority as to such property to a subsequent judgment for an individual over a prior judgment for a partnership debt. It is true that courts of equity will sometimes give to a mere equitable lien, which is prior in point of time, a preference over a subsequent judgment; but this will be done only where such prior lien is specific in its character. \* \* \* The mere general equity of the separate creditors to have their debts first paid out of the individual property of the partners does not amount to a lien at all, much less a lien of the kind necessary to give it a preference over a judgment for a partnership debt."<sup>18</sup>

and we are not disposed to favor its introduction into our system." The same doctrine has been approved in the United States District Court. See "*Bankruptcy*," Dec. Dig. (Key No.) §§ 309, 351; Cent. Dig. §§ 555-560; "*Partnership*," Dec. Dig. (Key No.) §§ 186-188; Cent. Dig. §§ 339-342.

<sup>18</sup> Selden, J., in *MEECH v. ALLEN*, 17 N. Y. 300, 72 Am. Dec. 465, Gilmore, Cas. Partnership, 499; In re *SANDUSKY*, Fed. Cas. No. 12,308.

The firm creditor who has secured a lien against the assets of a separate partner may be compelled to exhaust the firm assets before he realizes upon his security. In re *Lewis*, Fed. Cas. No. 8,313. But see In re *SANDUSKY*, 17 N. B. R. 452, Fed. Cas. No. 12,308, where the court refused to enjoin, at the suit of separate creditors, the firm creditor from realizing on his lien at law against the estate of one of the partners.

The Court of Chancery in England permits a petitioning creditor, though a joint creditor, to charge the separate effects *pari passu* with the separate creditors, because, as it is said, his petition, being

### SAME—PARTNER AGAINST THE SEPARATE ESTATE OF A COPARTNER

148. A partner is not entitled to payment out of the estate of his copartner until the firm creditors have been paid, except—

#### EXCEPTIONS:

- (a) While the copartner's estate is insufficient to pay his separate creditors.
- (b) Where there are no firm debts, or he has paid them, or they have ceased for any reason to exist.

prior in time, is in the nature of an execution in behalf of himself and the separate creditors. *Ex parte Ackerman*, 14 Ves. 604; *Ex parte Hull*, 9 Ves. 349; *Ex parte Detastel*, 17 Ves. 247; *Ex parte Burnett*, 2 Mont. D. & D. 357. But see *Murrill v. Neil*, 8 How. 414, 12 L. Ed. 1135; *Ex parte Abell*, 4 Ves. 837. This exception applies only to the petitioning creditor. The other firm creditors are not let in to share in the separate estate. *Ex parte ELTON*, 3 Ves. Jr. 238. See *Crispe v. Perritt*, 1 Atk. 133. This exception does not appear to have been recognized by the courts of this country. *Murrill v. Neil*, 8 How. 414, 12 L. Ed. 1135.

By the United States statutes debts due the United States are entitled to priority out of the estate of an insolvent debtor, or out of the estate of a deceased debtor in the hands of an executor or an administrator, provided the estate is insufficient to pay all the claims due from the deceased. Rev. St. § 3466 (U. S. Comp. St. 1901, p. 2314). This priority is preserved in bankruptcy by the Bankruptcy Act of 1898, with the exception that the claims of the United States are postponed to the costs of administration and to certain claims for wages due. Bankruptcy Act July 1, 1898, c. 541, § 64b, 30 Stat. 563 (U. S. Comp. St. 1901, p. 3447). The priority given to the United States by section 3466 gives it a preference in bankruptcy to the assets of an insolvent partner as against his separate creditors, even though the claim of the United States may be one against the firm of which the partner was a member. *LEWIS v. UNITED STATES*, 92 U. S. 622, 23 L. Ed. 513. But a claim against one partner does not give it a priority against the assets of the partnership, because "it is a rule too well settled to be now called in question that the interest of each partner in the partnership property is his share in the surplus, after the partnership debts are paid; and that surplus only is liable for the separate debts of such partner." *United States v. Hack*, 8 Pet. 275, 8 L. Ed. 941. See "*Partnership*," Dec. Dig. (Key No.) §§ 186-188; Cent. Dig. §§ 339-342.

*Partner as Creditor of Copartner*

It has been shown that the reason why a partner, who is a creditor of the firm, cannot compete with the firm creditors in the distribution of the firm assets, is that the firm creditors are his own creditors. The creditors of a partnership are also the creditors of each partner. In consequence, "it has been held that one partner cannot prove against his copartner, because, in ordinary cases, that proof would diminish the surplus of the estate of the debtor partner, and thereby the creditor partner, if admitted to prove, would come into competition with his own creditors, namely, the joint creditors, and detract to the extent of the proof from the benefit which they would derive from the separate estate."<sup>19</sup> Hence the general rule is that a partner cannot prove against his copartner while firm debts remain unsatisfied.<sup>20</sup>

*Exception—Copartner's Estate Insufficient to Pay Separate Creditors*

The reason and the rule apply only to firm creditors, however, and if the circumstances are such that the partner cannot compete with the firm creditors by proving against his partner in bankruptcy he will be allowed to prove in competition with the other separate creditors of such partner. Thus it was held in a case, where it was shown that by no possibility could there be any surplus left after the separate debts were satisfied, that a partner could prove with the separate creditors; the Lord Chancellor<sup>21</sup> saying: "I think it reasonable and just that the rule should not be extended beyond the reason which introduced it and was the cause of its being laid down; and if it be true that the estate of the partner against which the proof is tendered cannot by any possibility yield a surplus, it would be unreasonable and unjust to refuse the opportunity of proof being made."<sup>22</sup>

<sup>19</sup> Ex parte TOPPING, 4 De Gex, J. & S. 551, 556, Gilmore, Cas. Partnership, 576. See "Partnership," Dec. Dig. (Key No.) § 188; Cent. Dig. § 341.

<sup>20</sup> Ex parte BASS, 36 L. J. Bk. 39. See "Partnership," Dec. Dig. (Key No.) § 188; Cent. Dig. § 341.

<sup>21</sup> Lord Westbury.

<sup>22</sup> Ex parte TOPPING, 4 De G., J. & S. 551, 556, Gilmore, Cas.

*Same—No Firm Debts in Existence*

The same is true if there are no firm creditors. For instance, if one partner pays all of the debts of the firm, he will be allowed to prove his claim for contribution against the other partners in bankruptcy in competition with their separate creditors.<sup>23</sup>

It would seem, also, that a bona fide assignee for value of a partner's claim against his copartner could prove the same.

## SAME—RIGHTS OF SECURED CREDITORS

149. A creditor who has received from his debtor security for his debt may nevertheless, under the general rule of distribution enforced in equity, without surrendering the security, prove against his debtor's estate for the full amount of his claim and receive a dividend thereon. He may also enforce his

Partnership, 576. See "*Partnership*," *Dec. Dig.* (Key No.) § 188; *Cent. Dig.* § 341.

<sup>23</sup> Ex parte TAYLOR, 2 Rose, 175. It is not sufficient, however, merely to indemnify the firm creditors against loss as a result of such proof. Ex parte Moore et al., 2 Gly. & J. 166. See, contra, Ex parte Ogilvy, 2 Rose, 177.

In compelling such contribution against one, if there are others and they are all insolvent, proof can be made for half of the amount paid. In re DELL, Fed. Cas. No. 3,774.

The following exceptions are also mentioned by Lindley, but they do not appear to have been recognized in the United States: "The principle which allows joint estate to prove against separate estate, and separate estate to prove against joint estate, in cases where there has been a fraudulent conversion of property, or where there have been distinct trades, and a debt contracted in the course of those trades, is also applicable to proofs by one partner against another, in similar cases." Lindley's *Law of Partnership* (7th Ed.) p. 811.

A retiring partner, when the remaining partner has assumed the firm debts, can, if compelled to pay the firm debts, prove, in the name of the creditor paid, against the estate of the remaining partner in bankruptcy. In re Dillon (D. C.) 100 Fed. 627. It is doubtful whether he can compete with the other firm creditors in such proof. In re Denning (D. C.) 114 Fed. 219. See "*Bankruptcy*," *Dec. Dig.* (Key No.) § 309; *Cent. Dig.* § 556.

security. If more than sufficient is produced from both sources to satisfy his debt, the surplus will go to the debtor's estate. In bankruptcy, however, he must either stand by his security alone, or surrender it, and have it valued, and receive a dividend only upon the unpaid balance.

*Right of Secured Creditor—Equity Rule*

The general rule of equity in insolvency proceedings is that those creditors who have secured claims may prove against the estate of the insolvent for the full amount of their claim and also realize upon the security for the balance; it being the duty of the representative of the insolvent to redeem the securities in case they are more than sufficient to pay the balance due.<sup>24</sup> This is undoubtedly in accord with the contract of the parties. As said in a New York case: "The agreement between the debtor and creditor was that the debt should be paid. That debt is a definite quantity, and nothing less than its full amount can be said to be the debt. It is not altered or affected in its amount because the creditor may hold some collateral security. That is not a factor of the debt, but is merely an incident to the debt. The very force and meaning of a collateral security are in the idea of a guaranty of the performance of the principal agreement, which was to pay the debt. The property which a creditor holds as collateral to the indebtedness of his debtor secures him to that extent, in case his debt is not paid in full by the debtor or by his estate.

<sup>24</sup> *Mason v. Bogg*, 2 Myl. & Cr. 443; *Kellock's Case*, L. R. 3 Ch. App. 769; *LEWIS v. UNITED STATES*, 92 U. S. 618, 23 L. Ed. 513; *Findlay v. Hosmer*, 2 Conn. 350; *In the Matter of Bates*, 118 Ill. 524, 9 N. E. 257, 59 Am. Rep. 383; *Furness v. Union Nat. Bank*, 147 Ill. 570, 35 N. E. 624; *Levy v. Chicago Nat. Bank*, 158 Ill. 88, 42 N. E. 129, 30 L. R. A. 380; *Third Nat. Bank of Detroit v. Haug*, 82 Mich. 607, 47 N. W. 33, 11 L. R. A. 327; *Winston v. Biggs*, 117 N. C. 206, 23 S. E. 316; *Moses v. Ranlet*, 2 N. H. 488; *PEOPLE v. E. REMINGTON & SONS*, 121 N. Y. 328, 24 N. E. 793, 8 L. R. A. 458; *Kellogg v. Miller*, 22 Or. 406, 30 Pac. 229, 29 Am. St. Rep. 618; *ALLEN v. DANIELSON*, 15 R. I. 480, 8 Atl. 705, *Gilmore, Cas. Partnership*, 564; *West v. Bank of Rutland*, 19 Vt. 403; *Walker v. Baxter*, 26 Vt. 710. See "*Insolvency*," *Dec. Dig. (Key No.)* § 108; *Cent. Dig.* §§ 161, 164-169.

As between the creditor and his debtor, the latter could not compel the former to resort first to his collaterals before asserting his claim by a personal suit. The debtor has no control over the application of the collaterals. It is a general rule of equity that the creditor is not bound to apply his collateral securities before enforcing his direct remedies against the debtor. Then on what principle can one hold that, because the debtor becomes insolvent, the contract with his creditor is changed, and that the creditor cannot, under those circumstances, enforce his direct claim against the debtor until he has realized on his securities? Is the rule capable of such inversion? I cannot see any reason in the proposition. I do not see why, in the absence of intervention by positive or statutory law, the engagements of the parties should be varied."<sup>25</sup>

In Massachusetts the rule and the reason upon which it is based have both been rejected, and the rule adopted that the creditor can only prove for the difference between the amount of his claim and the value of his security. This rule is said to be "consistent with the nature of the contract. For the property pledged is in fact security for no more of the debt than its value will amount to; and for all the rest the creditor relies upon the personal credit of his debtor, in the same manner he would for the whole, if no security were taken."<sup>26</sup> This view of the contract has been denied by the Supreme Court of the United States in the following language: "We cannot concur in the view expressed by Chief Justice Parker. \* \* \* We think the collateral is security for the whole debt and every part of it, and is as applicable to any balance that remains after payment

<sup>25</sup> Per Gray, J., in *PEOPLE v. E. REMINGTON & SONS*, 121 N. Y. 328, 333, 24 N. E. 793, 794, 8 L. R. A. 458, Gilmore, *Cas. Partnership*, 566, note. See "*Insolvency*," *Dec. Dig. (Key No.)* § 108; *Cent. Dig.* §§ 161, 164-169.

<sup>26</sup> Parker, C. J., in *Armory v. Francis*, 16 Mass. 308, 311. The court further declared that "the same rule would undoubtedly be applied in England to cases of insolvent estates, when the debtor has deceased, if any mode of settlement and distribution of such insolvent estates existed there." But see *Mason v. Bogg*, 2 Myl. & C. 443. See "*Insolvency*," *Dec. Dig. (Key No.)* § 108; *Cent. Dig.* §§ 161, 164-169.

from other sources as to the original amount due, and that the assumption is unreasonable that the creditor does not rely on the responsibility of the debtor according to his promise." <sup>27</sup>

*Same—Bankruptcy Rule*

In bankruptcy, however, the rule is different. Here the security must be surrendered or sold before the principal debt can be realized upon. This rule was not originally based upon any definite direction of the bankruptcy laws, but resulted from the interpretation which the courts placed upon the direction found in the early bankruptcy acts, which required that the assets of a bankrupt should be distributed ratably among his creditors.<sup>28</sup> Upon similar direction in the insolvency laws of various states the same rule has been applied.<sup>29</sup> By the English Bankrupt Act of 1869, and by those of the United States of 1867 and of 1898, it is expressly provided that a secured creditor must account for his securities before proving against the general assets; the provision of the United States bankruptcy act of 1898 being as follows: "The value of securities held by secured creditors shall be determined by converting the same into money according to the terms of the agreement pursuant to which such securities were delivered to such creditors or by such creditors and the trustee, by agree-

<sup>27</sup> Fuller, C. J., in *Merrill v. National Bank of Jacksonville*, 173 U. S. 131, 141, 19 Sup. Ct. 360, 364, 43 L. Ed. 640. See "*Insolvency*," *Dec. Dig. (Key No.)* § 108; *Cent. Dig.* §§ 161, 164-169.

<sup>28</sup> See the dissenting opinion of Justice White in *Merrill v. National Bank of Jacksonville*, *supra*, for an exhaustive discussion of the origin of the bankruptcy rule. See "*Bankruptcy*," *Dec. Dig. (Key No.)* §§ 309, 310; *Cent. Dig.* §§ 501-507, 555-564.

<sup>29</sup> *Wurtz v. Hart*, 13 Iowa, 515; *American National Bank of Kansas City v. Branch*, 57 Kan. 27, 45 Pac. 88; *National Union Bank of Maryland v. National Mechanics' Bank*, 80 Md. 371, 30 Atl. 913, 27 L. R. A. 476, 45 Am. St. Rep. 350; *Vanderveer v. Conover*, 16 N. J. Law, 487; *Armory v. Francis*, 16 Mass. 308; *Farnum v. Boutelle*, 13 Metc. (Mass.) 159; *Bell v. Fleming's Ex'rs*, 12 N. J. Eq. 13; *Whittaker v. Amwell Nat. Bank*, 52 N. J. Eq. 410, 29 Atl. 203; *Fields v. Creditors of Wheatley*, 1 Sneed (Tenn.) 351; *Winton v. Eldridge*, 3 Head (Tenn.) 361; *In re Frasch*, 5 Wash. 344, 31 Pac. 755, 32 Pac. 771. See "*Insolvency*," *Dec. Dig. (Key No.)* § 108; *Cent. Dig.* §§ 161, 164-169.

ment, arbitration, compromise, or litigation as the court may direct, and the amount of such value shall be credited upon such claims, and a dividend shall be paid only on the unpaid balance."<sup>30</sup> The statute does not apply, however, to a situation where the security is that of a third person. It is only where it is the property of the bankrupt that it must be accounted for. Even where a partnership becomes bankrupt, if the partnership creditor holds a security on the separate property of one partner, he may prove against the assets of the firm his entire claim and still retain the security.<sup>31</sup>

#### SAME—RIGHTS OF JOINT AND SEVERAL CREDITORS—DOUBLE PROOF

150. A creditor who has obtained the obligation of the firm, as well as the several obligation of the members of the firm, for the same debt, may prove against both the firm and separate estates. This was true under the United States bankruptcy act of 1867, but is apparently not true under the act of 1898. In England such a creditor was required to elect the estate against which he would prove, unless the joint and several liabilities arose out of distinct contracts.

##### *Double Proof—English Rule*

It was formerly the rule in the bankruptcy practice in England that, if a creditor of a firm had both the promise of the firm and the separate promise of the partners to pay,

<sup>30</sup> Act July 1, 1898, c. 541, § 57h, 30 Stat. 560 (U. S. Comp. St. 1901, p. 3443).

The bankruptcy rule has been made to apply in England to the administration in chancery of the insolvent estate of one deceased and to the winding up of an insolvent company under the Companies Act by section 25 of the Judicature Act of August 5, 1873, c. 66, and by an amendment thereto adopted August 11, 1875, c. 77.

<sup>31</sup> In re Holbrook, Fed. Cas. No. 6,588; In re May, Fed. Cas. No. 9,327; In re Thomas, Fed. Cas. No. 13,886. See "Bankruptcy," Dec. Dig. (Key No.) §§ 309, 310; Cent. Dig. §§ 501-507, 555-564.

he must elect, in the case of the bankruptcy of the firm and the partners liable, from which estate to receive dividends. The reason given for the rule was that, while the holder of a joint and several obligation might sue all jointly or might sue each separately, he could not do both; that, since he could not bring both a joint and a several action at law, he ought not to be permitted to do what is equivalent to the same thing in bankruptcy; that is, to share in both the firm and the separate estates.<sup>32</sup> Moreover, if he chose to go against the firm estate, he was held to be for all purposes a firm creditor, and when the separate creditors had satisfied their claims out of the separate estate he had no greater rights in that estate than other firm creditors had.<sup>33</sup> He had, however, a reasonable time in which to make his election.<sup>34</sup>

It will be perceived that by this rule "the advantage of a joint and separate creditor is no more than that he can elect whether he will be in the first instance a joint or a separate creditor."<sup>35</sup> Considerable dissatisfaction was expressed by the English judges at this result, Lord Eldon saying: "I never could see why a creditor, having both joint and several security, should not go against both estates."<sup>36</sup> It was once thought that an exception to the rule prohibiting one firm receiving dividends from two estates existed where the estates liable were those of two firms carrying on distinct trade, though one was included in the other. It was decided finally, however, that double proof should not be allowed in any case.<sup>37</sup> The objections to the

<sup>32</sup> *Ex parte Rowlandson*, 3 P. W. 405; *Ex parte Banks*, 1 Atk. 106; *Ex parte Bond*, 1 Atk. 98. See "*Bankruptcy*," *Dec. Dig. (Key No.)* § 309; *Cent. Dig.* §§ 555-564.

<sup>33</sup> *Ex parte BEVAN*, 10 Ves. 106. See "*Bankruptcy*," *Dec. Dig. (Key No.)* § 309; *Cent. Dig.* §§ 555-564.

<sup>34</sup> *Ex parte Bond and Hill*, 1 Atk. 98. See "*Bankruptcy*," *Dec. Dig. (Key No.)* § 309; *Cent. Dig.* §§ 555-564.

<sup>35</sup> Lord Eldon in *Ex parte BEVAN*, 10 Ves. 107, 110. See "*Bankruptcy*," *Dec. Dig. (Key No.)* § 309; *Cent. Dig.* §§ 555-564.

<sup>36</sup> *Ex parte BEVAN*, 10 Ves. 107, 109. He added, however: "It is settled he must elect." See "*Bankruptcy*," *Dec. Dig. (Key No.)* § 309; *Cent. Dig.* §§ 555-564.

<sup>37</sup> *Ex parte Mould*, Mont. 337, s. c. Mont. & B. 28; *Goldsmid v.*

rule led to the passing of a statute<sup>38</sup> providing, in effect, that where members of a firm are jointly liable on a contract, and they are also severally liable in the same contract, proof may be made by the creditor against both estates. The statute has been construed to apply to the ordinary joint and several notes or bonds,<sup>39</sup> and even to a case where a partner, who was a trustee, placed some of the trust funds in the hands of the firm of which he was a member for investment, and the firm converted the funds.<sup>40</sup> Hence, though the rule against double proof, except where permitted by a statute, still prevails in England, the cases which are not covered by the statute are comparatively few.

*Same—American Rule*

The former English rule has never been followed in this country. In a Maine case it was said: "A joint and several note contains in one instrument two contracts, separate and distinct from each other. The makers promise as a firm, and also as individuals. In a legal sense, the parties to the two contracts are not the same, but different, parties. The parties meant something by this form of double contract. The holder intended to have a security upon more than one estate. The presumption is that the creditor would not have paid the consideration he did, had it not been upon the expectation of a double security. Why should not a creditor have, as Lord Eldon thought he ought in justice

Cazenove, 7 H. L. C. 785. See "*Bankruptcy*," *Dec. Dig. (Key No.)* § 309; *Cent. Dig.* §§ 555-564.

<sup>38</sup> Bankruptcy Act 1883, Schedule 2: "If a debtor was at the date of the receiving order liable in respect of distinct contracts as a member of two or more distinct firms, or as a sole contractor, and also as a member of a firm, the circumstance that the firms are in whole or in part composed of the same individuals, or that the sole contractor is also one of joint contractors, shall not prevent proof in respect of the contracts, against the properties respectively liable on the contracts."

<sup>39</sup> Ex parte Honey, L. R. 7 Ch. App. 178; Ex parte Stone, L. R. 8 Ch. 914. See "*Bankruptcy*," *Dec. Dig. (Key No.)* § 309; *Cent. Dig.* §§ 555-564.

<sup>40</sup> In re Penkers, Ex parte Sheppard, 19 Q. B. D. 84. See "*Bankruptcy*," *Dec. Dig. (Key No.)* § 309; *Cent. Dig.* §§ 555-564.

to have, 'the benefit of the caution he has used'?<sup>41</sup> He might have taken separate notes for the same debt. Why not allow the same thing to be simply and directly done?"<sup>42</sup> It has, however, been held that a creditor, though he can demand and receive a dividend from both funds, can receive a dividend from the second fund, not on the full amount of his claim, but only on the amount by which the claim exceeded the dividends received from the first fund.<sup>43</sup>

In the federal courts it has been held that the bankruptcy act of 1867 in terms permitted double proof in such cases as have just been considered,<sup>44</sup> but under the act of 1898 it has been held that a partnership creditor holding a joint and several note of the members of the firm was not entitled to participate with the separate creditors in the distribution of the separate estate of one of the partners.<sup>45</sup>

### SAME—INSOLVENCY OR BANKRUPTCY OF A PARTNER

151. A partner may be adjudicated a bankrupt, although his copartners remain solvent. In such case the solvent partners and the trustee of the bankrupt partner are, by some decisions, treated as tenants in common of the firm assets, and each may administer whatever assets he may get into his possession, but neither can dispossess the other. By other decisions, the bankruptcy of a partner does

<sup>41</sup> Ex parte BEVAN, 10 Ves. 107. See "*Bankruptcy*," Dec. Dig. (Key No.) § 309; Cent. Dig. §§ 555-564.

<sup>42</sup> Ex parte Nason, 70 Me. 303, 367. See, also, In re FARNHAM, 6 Bost. Law Rep. 21; ROGER WILLIAMS NAT. BANK v. HALL, 160 Mass. 171, 35 N. E. 666; HAWKINS v. MAHONEY, 71 Minn. 155, 73 N. W. 720, Gilmore, Cas. Partnership, 558. See "*Bankruptcy*," Dec. Dig. (Key No.) § 309; Cent. Dig. §§ 555-564.

<sup>43</sup> HAWKINS v. MAHONEY, 71 Minn. 155, 73 N. W. 720, Gilmore, Cas. Partnership, 558. See "*Bankruptcy*," Dec. Dig. (Key No.) § 309; Cent. Dig. §§ 555-564.

<sup>44</sup> Emery v. Canal Nat. Bank, 7 N. B. R. 217, Fed. Cas. No. 4,446. See "*Bankruptcy*," Dec. Dig. (Key No.) § 309; Cent. Dig. §§ 555-564.

<sup>45</sup> In re Mosler (D. C.) 112 Fed. 138. See "*Bankruptcy*," Dec. Dig. (Key No.) § 309; Cent. Dig. §§ 555-564.

not affect the title to the firm assets; the solvent partners being permitted to wind up the affairs of the firm as surviving partners. The latter view is adopted in United States bankruptcy act of 1898.

*Insolvency or Bankruptcy of a Partner—Former View*

It was formerly held that the purchaser on execution sale of the interest of a partner in a partnership became a tenant in common with the other partners.<sup>46</sup> Following the analogy thus established, it was likewise held that the assignee of a bankrupt partner became a tenant in common with the remaining partners. Thus it was said by Lord Mansfield:<sup>47</sup> "If a creditor takes out execution against one partner, as in [Heydon v. Heydon] 1 Salk. 392, the vendee would be tenant in common; and in the case of Skipp v. Harwood, in Chancery, 6th July, 1747, Lord Hardwicke, according to my note says: 'If a creditor of one partner takes out execution against the partnership effects, he can have only the undivided share of his debtor, and must take it in the same manner the debtor himself had it, and subject to the rights of the other partners. The assignees, under a commission of bankruptcy against one partner, must be in the same state. They can only be tenants in common of an undivided moiety, subject to all the rights of the other partner.'" The same view was held by Chancellor Kent, who said that:<sup>48</sup> "It is admitted, in all the cases, that the assignees of a bankrupt partner, and the remaining solvent partner, are tenants in common with respect to the partnership funds; and like all tenants in common one party cannot call the joint property out of the hands of the other. There is no such case. They are entitled equally to the possession in law. \* \* \* If the pretension of either

<sup>46</sup> HEYDON v. HEYDON, 1 Salk. 392, Gilmore, Cas. Partnership, 507. See "Partnership," Dec. Dig. (Key No.) § 220; Cent. Dig. §§ 459, 459½.

<sup>47</sup> FOX v. HANBURY, Cowp. 445, 449. See "Bankruptcy," Dec. Dig. (Key No.) § 149; Cent. Dig. § 229.

<sup>48</sup> MURRAY v. MURRAY, 5 Johns. Ch. (N. Y.) 60, 61, Gilmore, Cas. Partnership, 578. See "Bankruptcy," Dec. Dig. (Key No.) § 149; Cent. Dig. § 229.

party to an exclusive distribution of the partnership funds were to be examined upon principles of policy and equity, the assignees would have the better pretension, in the view of this court, because the solvent partner has it in his power to give preferences, and defeat the equality and equity of the bankrupt system. Assignees, on the other hand, are bound to make a ratable distribution of the assets, and, being trustees under the control of this court, there is no good reason why their equal rights at law as tenants in common should suffer diminution here. They are tenants in common, but with particular equities in them, as Lord Eldon observed, 'vastly beyond what tenants in common have where no bankruptcy has occurred'; and their claim to the distribution of the partnership fund has been encouraged and strengthened by the decisions in chancery." As late as 1876 Judge Lowell declared<sup>49</sup> that the assignee in bankruptcy "is a tenant in common with the solvent partner of the joint stock. It usually happens that the latter will be in possession of the stock, and his possession will not be disturbed excepting for good reasons; and, on the other hand, if, as in this case, the assignee is in possession, that will not be disturbed without good cause."

*Same—Modern View*

Modern cases as a rule, however, incline to the view that an assignment in insolvency by a partner of his share does not "transfer the corpus of the partnership property, but only his share of what would remain after the debts were paid."<sup>50</sup> According to this rule, it would seem that the title to firm property in the case of the bankruptcy of one partner passes to the solvent partner in somewhat the same way that it passes to the survivor in case of the death of a partner. Wherever the title may be, however, there is no doubt that the solvent partners have the right to possess and the power to sell and convey the partnership property. This

<sup>49</sup> *Wilkins v. Davis*, 15 N. B. R. 60, Fed. Cas. No. 17,664. See "*Bankruptcy*," *Dec. Dig. (Key No.)* § 149; *Cent. Dig.* § 229.

<sup>50</sup> *OGDEN v. ARNOT*, 29 Hun (N. Y.) 146; *Amsinck v. Bean*, 89 U. S. 395, 22 L. Ed. 801; *JONES v. NEWSOM*, Fed. Cas. No. 7,484. See "*Bankruptcy*," *Dec. Dig. (Key No.)* § 149; *Cent. Dig.* § 229; "*Insolvency*," *Dec. Dig. (Key No.)* § 56; *Cent. Dig.* § 71.

is expressly provided in the United States bankruptcy law of 1898 as follows: "In the event of one or more, but not all, of the members of a partnership being adjudged bankrupt, the partnership property shall not be administered in bankruptcy, unless by consent of the partner or partners not adjudged bankrupt, but such partner or partners not adjudged bankrupt shall settle the partnership business as expeditiously as its nature will permit, and account for the interest of the partner or partners adjudged bankrupt." The statute also provides for bankruptcy of the partnership, and it has been held that the partnership assets were not in the hands of the court for distribution, even though each member of the firm had been adjudicated bankrupt; that, though the statute quoted above in terms applied only to cases where less than all of the partners were bankrupt, it was exceptional and negative in construction; and that the court were not warranted in constructing an affirmation out of it.<sup>51</sup>

<sup>51</sup> In re Mercur, 122 Fed. 384, 58 C. C. A. 472.

"If the assignee in bankruptcy of a partner becomes a tenant in common with the other partners, whose title relates back to the date of the commission of the act of bankruptcy, it would seem that a legal lien on the firm property secured by attachment on behalf of a firm creditor subsequent to the act of bankruptcy would be lost by the assignment." See DUTTON v. MORRISON, 17 Ves. 193; In re WAIT, 1 Jac. & W. 605. On the other hand, if the assignee gets but a chose in action, the lien should not be affected by the assignment. See RUSSELL v. COLE, 167 Mass. 6, 44 N. E. 1057, 57 Am. St. Rep. 432; FERN v. CUSHING, 4 Cush. (Mass.) 357, Gilmore, Cas. Partnership, 581; Mason v. Warthens, 7 W. Va. 532; Bankruptcy Law July 1, 1898, c. 541, §§ 67c, 67f, 30 Stat. 564, 565 (U. S. Comp. St. 1901, pp. 3449, 3450).

It was formerly held that the assignee of a bankrupt partner and the remaining partners were so united in interest that they must join in actions on firm obligations. See Eckhardt v. Wilson, 8 D. & E. 140; RUSSELL v. COLE, 167 Mass. 6, 44 N. E. 1057, 57 Am. St. Rep. 432; HALSEY v. NORTON, 45 Miss. 703, 7 Am. Rep. 745, Gilmore, Cas. Partnership, 583; Browning v. Marvin, 22 Hun (N. Y.) 547. This practice does not obtain under the United States Bankruptcy Law of 1898 (30 Stat. 545, c. 541 [U. S. Comp. St. 1901, p. 3418]). See In re Meyer, 98 Fed. 976, 39 C. C. A. 368; In re Palladori, 2 N. B. N. R. 945; In re Blair (D. C.) 99 Fed. 76. See "Bankruptcy," Dec. Dig. (Key No.) § 149; Cent. Dig. § 229; "Insolvency," Dec. Dig. (Key No.) § 56; Cent. Dig. § 71.

*Effect of Discharge*

In general, a discharge in bankruptcy of an individual partner discharged him from liability on his partnership obligations, as well as from his liability on his individual debts.<sup>52</sup> This was always true under the English bankruptcy acts,<sup>53</sup> and is undoubtedly true under the act of 1883.<sup>54</sup> The same is true under the present bankruptcy act in the United States,<sup>55</sup> though the authorities were in conflict on the subject under the act of 1867.<sup>56</sup>

### SAME—RIGHTS AGAINST ESTATE OF DECEASED PARTNER

152. In England, and in some jurisdictions in the United States, firm creditors may prove their claims directly against the estate of the deceased partner and are entitled to payment after such partner's separate creditors. In other jurisdictions, they are not entitled to prove against the separate estate without a showing that the surviving partners have been proceeded against to execution at law or that they are insolvent. In all jurisdictions, if there be no joint estate nor solvent living partner, the firm creditors may participate equally with the separate creditors in the separate estate.

<sup>52</sup> *MATTIX v. LEACH*, 16 Ind. App. 112, 43 N. E. 969. See "Bankruptcy," *Dec. Dig. (Key No.)* § 429; *Cent. Dig.* §§ 778, 782.

<sup>53</sup> *Ex parte Hammond*, L. R. 16 Eq. Cas. 614. See "Bankruptcy," *Dec. Dig. (Key No.)* § 429; *Cent. Dig.* §§ 778, 782.

<sup>54</sup> Bankruptcy Act 1883, § 30.

<sup>55</sup> *Jarecki Mfg. Co. v. McElwaine* (C. C.) 107 Fed. 249; *In re Kaufman* (D. C.) 136 Fed. 262. See "Bankruptcy," *Dec. Dig. (Key No.)* § 429; *Cent. Dig.* §§ 778, 782.

<sup>56</sup> That a discharge granted to one partner, in his separate bankruptcy, releases him from his joint as well as individual debts: *In re Downing*, Fed. Cas. No. 4,044; *In re Stevens*, Fed. Cas. No. 13,393; *In re Abbe*, Fed. Cas. No. 4; *In re Leland*, Fed. Cas. No. 8,228; *Wilkins v. Davis*, Fed. Cas. No. 17,604. That such a discharge does not so release him: *Hudgins v. Lane*, Fed. Cas. No. 6,827; *In re Winkens*, Fed. Cas. No. 17,875. See "Bankruptcy," *Dec. Dig. (Key No.)* § 429; *Cent. Dig.* §§ 778, 782.

It has already been shown<sup>57</sup> that there is a conflict in the cases as to whether or not action can be brought in equity against the estate of a deceased partner while there are in existence joint assets or there is a living solvent partner. This conflict only applies, however, to the situation where the estate of the deceased partner is solvent. If it is insolvent, the firm creditors will not be permitted to compete with the separate creditors, even in jurisdictions like England and Illinois, where under ordinary circumstances the estate of the deceased partner may be proceeded against in equity immediately.<sup>58</sup> If, however, it is shown that there is no joint estate and no living solvent partner, the partnership creditors will be allowed to participate with the separate creditors of a deceased partner. "It is only where there are two funds out of which a creditor may be paid that equity intervenes in favor of another creditor, who is entitled to payment out of one fund only, and requires the assets to be marshaled."<sup>59</sup>

<sup>57</sup> Chapter IV, §§ 72, 73, pp. 227-233, on Liability of Estate of Deceased Partner.

<sup>58</sup> *Gorry v. Chiswell*, 9 Ves. 118; *Moline Water Power & Mfg. Co. v. Webster*, 28 Ill. 234; *Pahlman v. Graves*, 26 Ill. 405. See, also, *DOGGETT v. DILL*, 108 Ill. 560, 48 Am. Rep. 565, *Gilmore, Cas. Partnership*, 300; *Greene v. Butterworth*, 45 N. J. Eq. 738, 17 Atl. 949. See "*Partnership*," *Dec. Dig. (Key No.)* §§ 247, 258; *Cent. Dig.* §§ 524-528, 566.

<sup>59</sup> *Westbay v. Williams*, 5 Ill. App. 521, 528. But see *Wilder v. Keeler*, 3 Paige (N. Y.) 167; *STEWART'S CASE*, 4 Abb. Prac. (N. Y.) 408. In Indiana partnership creditors are not allowed to share with the separate creditors of a deceased solvent partner, even though there are no firm assets or living solvent partner. *American Bonding Co. v. State ex rel. Whisler*, 40 Ind. App. 559, 82 N. E. 548; *Warren v. Farmer*, 100 Ind. 593; *Weyer v. Thornburgh*, 15 Ind. 124. See "*Partnership*," *Dec. Dig. (Key No.)* §§ 247, 258; *Cent. Dig.* §§ 524-528, 566; "*Bankruptcy*," *Dec. Dig. (Key No.)* §§ 149, 309; *Cent. Dig.* §§ 229, 555-564; "*Insolvency*," *Dec. Dig. (Key No.)* §§ 56, 120; *Cent. Dig.* §§ 71, 189.

## CHAPTER VIII

## ACTIONS BETWEEN PARTNERS

- 153. Action on Partnership Claim or Liability—At Law.
- 154. In Equity.
- 155. Under the Code.
- 156. Actions between Firms with Common Member.
- 157. Action at Law on Individual Obligation.
- 158. Claims Not Connected with Partnership.
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- 164. Noninterference in Matters of Internal Regulation.
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- 166. Accounting and Dissolution.
- 167. Right to Accounting.
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- 171. Injunction.
- 172. Receivers.

## ACTION ON PARTNERSHIP CLAIM OR LIABILITY—AT LAW

153. A partner cannot maintain an action at law against his copartner upon either
- (a) An obligation to the firm from the defendant, or
  - (b) An obligation from the firm to the plaintiff.

In the absence of statute, there is no method by which an ordinary firm can sue or be sued as such; for the firm, as distinguished from the persons composing it, has no judicial existence. All proceedings, therefore, which have for their object the enforcement of partnership rights or partnership obligations, must be taken by or against the partners individually. It follows from this nonrecognition of the firm as an entity distinct from its members that no ac-

tion at law can be maintained by a partner against his copartners upon a claim against the firm, and vice versa, that no action at law can be maintained against a partner by his copartners upon a claim due the firm.<sup>1</sup>

The real reason why a partner cannot sue a copartner upon a partnership claim or a partnership liability is that until there has been an accounting, and all the partnership affairs are settled, there is no cause of action in favor of any partner against any of his copartners.<sup>2</sup> In *Ives v.*

<sup>1</sup> *Ames, Cas. Partn.* p. 449 et seq. "When a partnership is subsisting, and there is no liquidation of the accounts, though there is actually a balance of over £100 due to one partner, he [the creditor] cannot, upon such a debt, support a commission; but, had the partnership been determined, and had the solvent partner paid all debts, I should think he might sustain the commission." Lord Eldon, in *Ex parte NOKES*, 2 Mont. Bankr. p. 148, 1 Mont. & A. 47, note a.

Persons participating in and financial subscribers to an effort to push a bill through parliament looking to the establishment of a railway enterprise are in so far partners that one of them who actually did the surveying has not an action against one or all of them to receive his compensation. *HOLMES v. HIGGINS*, 1 Barn. & C. 74.

In an action on a contract between the parties whereby they had agreed to carry on business in a certain specified way, in which action the declaration set forth the agreement and alleged the defendant excluded the plaintiff from the management and profits of the business, and refused to make annual settlement and payments, and, although continuing the business on the premises and with the tools of the plaintiff, and making large profits, refused to recognize that plaintiff had any rights under the agreement, held, on demurrer, that the parties were partners; and the action therefore not maintainable. *RYDER v. WILCOX*, 103 Mass. 24. See "*Partnership*," *Dec. Dig. (Key No.)* §§ 103-110; *Cent. Dig.* §§ 156-172.

<sup>2</sup> See *Merrill v. Smith*, 158 Ala. 186, 48 So. 495; *Miner v. Lorman*, 56 Mich. 212, 22 N. W. 265; *Kalamazoo Trust Co. v. Merrill*, 159 Mich. 649, 124 N. W. 597; *CROSBY v. TIMOLAT*, 50 Minn. 171, 52 N. W. 528, *Gilmore, Cas. Partnership*, 469; *Christopherson v. Olson*, 104 Minn. 330, 116 N. W. 840; *Niven v. Spickerman*, 12 Johns. (N. Y.) 401; *Halsted v. Schmelzel*, 17 Johns. (N. Y.) 80; *Casey v. Brush*, 2 Caines (N. Y.) 293; *Simpson v. Miller*, 51 Or. 232, 94 Pac. 567. Cf. *Johnson v. Kelle*, 4 Thomp. & C. (N. Y.) 417; *Pattison v. Blanchard*, 6 Barb. (N. Y.) 537; *Ferguson v. Wright*, 61 Pa. 258; *Perley v. Brown*, 12 N. H. 493; *Young v. Brick*, 3 N. J. Law, 663; *Harris v. Harris*, 39 N. H. 45; *Scott v. Caruth*, 50 Mo. 120; *Chadsey v. Har-*

Miller,<sup>3</sup> Hand, P. J., said: "Until the affairs of the concern are wound up, what one partner may owe the firm is not a debt due to a copartner; nor is the indebtedness of the firm to one of the members a debt due from the other members to him. The rights of the parties were very clearly stated by Lord Cottenham, so late as in 1838, in Richard-

rison, 11 Ill. 151; BURNS v. NOTTINGHAM, 60 Ill. 531, Gilmore, Cas. Partnership, 459; White v. Ross, 35 Fla. 377, 17 South. 640; Lord v. Peaks, 41 Neb. 891, 60 N. W. 353; Remington v. Allen, 109 Mass. 47; NEWBY v. HARRELL, 99 N. C. 149, 5 S. E. 284, 6 Am. St. Rep. 503; O'Brien v. Smith, 42 Kan. 49, 21 Pac. 784.

As to the right of an indorsee of a firm note to a partner to sue, see CARPENTER v. GREENOP, 74 Mich. 664, 42 N. W. 276, 4 L. R. A. 241, 16 Am. St. Rep. 662, Gilmore, Cas. Partnership, 467; Walker v. Wait, 50 Vt. 668. Cf. Davis v. Merrill, 51 Mich. 480, 16 N. W. 864; Wintermute v. Torrent, 83 Mich. 555, 47 N. W. 358.

While a partnership exists or remains unsettled, no action at law can be maintained by one partner against another, except an action of account or assumpsit on a promise to account. Chase v. Garvin, 19 Me. 211; BURLEY v. HARRIS, 8 N. H. 233, 29 Am. Dec. 650, Gilmore, Cas. Partnership, 454. See Estes v. Whipple, 12 Vt. 373; Graham v. Holt, 25 N. C. 300, 40 Am. Dec. 408; Stothert v. Knox, 5 Mo. 112; Davenport v. Gear, 3 Ill. 495.

The relation of debtor and creditor between the surviving partner and the representative of the deceased partner does not arise until the affairs of the partnership are wound up and a balance is struck. Such balance is to be struck after all partnership affairs are settled. Gleason v. White, 34 Cal. 258; White's Adm'r v. Waide, Walk. (Miss.) 263.

One partner cannot sue another, for his share, while their partnership accounts are unsettled. Dewit v. Staniford, 1 Root (Conn.) 270; Lamalere v. Caze, 1 Wash. C. C. 435, Fed. Cas. No. 8,003; Kennedy v. McFadon, 3 Har. & J. (Md.) 194, 5 Am. Dec. 434; Ozeas v. Johnson, 1 Bin. (Pa.) 191; Young v. Brick, 3 N. J. Law, 663; Murray v. Bogert, 14 Johns. (N. Y.) 318, 7 Am. Dec. 466; Springer v. Cabell, 10 Mo. 640; McKnight v. McCutchen, 27 Mo. 436; Robinson v. Green's Adm'r, 5 Har. (Del.) 115; Smith v. Smith, 33 Mo. 557; Ives v. Miller, 19 Barb. (N. Y.) 196; Lower v. Denton, 9 Wis. 268. Where a debt against a firm has been collected of one of the partners, he cannot sue the other partner at law for contribution, though the debt was paid out of his separate property. Lawrence v. Clark, 9 Dana (Ky.) 257, 35 Am. Dec. 133. Partners cannot sue each other at law for any matter relating to the partnership con-

<sup>3</sup> 19 Barb. (N. Y.) 196, 200. See "Partnership," Dec. Dig. (Key No.) §§ 103-110; Cent. Dig. §§ 156-172.

son v. Bank of England.<sup>4</sup> That was a motion to compel a partner to pay into court a large sum, which it was insisted he had admitted he had drawn out, with the consent of the partners, before dissolution. The Lord Chancellor remarked upon the ordinary use of the words 'creditor' and 'debtor,' as applied to partners who advance to or draw money from the firm by consent, and added: 'But though these terms "creditor" and "debtor" are so used, and sufficiently explain what is meant by the use of them, nothing can be more inconsistent with the law of partnership than to consider the situation of either party as in any degree resembling the situation of those whose appellation has been so borrowed. The supposed creditor has no means of compelling payment of his debt; and the supposed debtor is liable to no proceedings, either at law or in equity; assuming always that no separate security has been taken or

cerns unless there has been a final settlement between them, the balance ascertained, and an express promise to pay the balance. Without a general adjustment of the partnership concerns, embracing all the partnership transactions, and concurred in by all the partners, there is no consideration to uphold an express promise of one partner to pay his copartner a balance alleged to be due. *Chadsey v. Harrison*, 11 Ill. 151. See, also, *Phillips v. Blatchford*, 137 Mass. 510; *Fisher v. Sweet*, 67 Cal. 228, 7 Pac. 657; *Bowzer v. Stoughton*, 119 Ill. 47, 9 N. E. 208; *Bullard v. Kinney*, 10 Cal. 60; *Learned v. Ayres*, 41 Mich. 677, 3 N. W. 178.

Where a trustee, under a deed of trust executed by one partner on partnership property as security for an individual debt, has recovered the property in replevin against the partner executing the deed, who was in possession of the property, the other partner must resort to equity in order to recover it from the trustee, as one partner cannot maintain an action at law against his co-owner for the joint property. *Hoff v. Rogers*, 67 Miss. 208, 7 South. 358, 19 Am. St. Rep. 301.

A partner cannot maintain an action for partition against his copartner as to real estate owned by the firm, where there has been no adjustment of the copartnership accounts. *KRUSCHKE v. STEFAN*, 83 Wis. 373, 53 N. W. 679; *Meinhart v. Draper*, 133 Mo. App. 50, 112 S. W. 709; *MacFarlane v. MacFarlane*, 82 Hun. 238, 31 N. Y. Supp. 272. Contra: *MOLINEAUX v. RAYNOLDS*, 54 N. J. Eq. 559, 35 Atl. 536, *Gilmore, Cas. Partnership*, 215. See, also, post, p. 491, "Actions in Equity." See "*Partnership*," *Dec. Dig. (Key No.)* §§ 103-110; *Cent. Dig.* §§ 156-172.

<sup>4</sup> 4 Mylne & C. 165. See "*Partnership*," *Dec. Dig. (Key No.)* §§ 103-110; *Cent. Dig.* §§ 156-172.

given. The supposed creditor's debt is due from the firm of which he is a partner, and the supposed debtor owes the money to himself, in common with his partners; and, pending the partnership, equity will not interfere to set right the balance between the partners.' And again: 'But if, pending the partnership, neither law nor equity will treat such advances as debts, will it be so after the partnership has determined, before any settlement of accounts, and before the payment of the joint debt, or the realization of the partnership estate? Nothing is more settled than that, under such circumstances, what may have been advanced by one partner, or received by another, can only constitute items in the account. There may be losses, the particular partner's share of which may be more than sufficient to exhaust what he has advanced, or profits more than equal to what the other has received; and until the amount of such profit and loss be ascertained, by the winding up of the partnership affairs, neither party has any remedy against or liability to the other for payment, from one to the other, or of what may have been advanced or received.'"

There is another reason which is sufficient in many cases to explain the rule that a partner cannot maintain an action at law against his copartner on a partnership claim or liability. This reason is that, wherever the partnership claim or liability on which the action is sought to be maintained is a joint one,<sup>5</sup> all the partners must be joined as plaintiffs or defendants, as the case may be.<sup>6</sup> Omission to join any partner may be pleaded in abatement of the action. It follows, therefore, that a partner suing on such a partnership claim or liability would have to be joined both as plaintiff and as a defendant. Now, at common law a party cannot at once be a plaintiff and a defendant in the same suit; or, in other words, he cannot sue himself either alone or in conjunction with others.<sup>7</sup>

<sup>5</sup> See chapter IV, § 70, p. 220, and chapter IX, §§ 174-176, pp. 530, 531.

<sup>6</sup> See chapter IX, §§ 179-180, p. 542.

<sup>7</sup> Story, Partn. 221; Bates, Partn. § 849; T. Pars. Partn. §§ 184, 185. "One member of a partnership cannot sue the firm at law for advances made by him to the joint concern, nor can the firm sue an individual partner for anything that he may have drawn out of the

*Illustrations—Action on Obligations to Firm*

Under the first branch of the rule, a partner cannot maintain an action against his copartner where the liability of the latter is in reality an obligation to the firm. Thus, one partner cannot maintain an action to recover the price of goods sold to another partner by the firm. This was held in an action of assumpsit by one of three partners in a steamboat against another, to recover one-third of the amount which the latter owed the firm for liquors bought by him at the bar of the boat. The partnership business had ceased, but its affairs had not been settled.<sup>8</sup> So, also, one partner is not liable to his copartner for money had and received to the use of the firm,<sup>9</sup> nor for money lent by the firm.<sup>10</sup>

joint stock or proceeds, no matter how much more than his share it might have been; and the reason is that one man cannot occupy the double position of plaintiff and defendant at the same time. The aid of this court is just as necessary to settle the account of these advances as it is to settle the accounts arising out of the immediate transactions of the special business of the partnership." *BRACKEN v. KENNEDY*, 3 Scam. (Ill.) 558, 564, *Gilmore, Cas. Partnership*, 470; *BURLEY v. HARRIS*, 8 N. H. 233, 29 Am. Dec. 650, *Gilmore, Cas. Partnership*, 454. See "*Partnership*," *Dec. Dig. (Key No.)* §§ 103-110, 115; *Cent. Dig.* §§ 156-172, 178.

<sup>8</sup> *Page v. Thompson*, 33 Ind. 137. See, also, *Ivy v. Walker*, 58 Miss. 253; *Bank of British North America v. Delafield*, 126 N. Y. 410, 27 N. E. 797; *BURLEY v. HARRIS*, 8 N. H. 233, 29 Am. Dec. 650, *Gilmore, Cas. Partnership*, 454. But see *Bennett v. Smith*, 40 Mich. 211. See "*Partnership*," *Dec. Dig. (Key No.)* §§ 103-110; *Cent. Dig.* §§ 140, 156-172.

<sup>9</sup> *Kutz v. Dreibelbis*, 126 Pa. 335, 17 Atl. 609; *Gardiner v. Fargo*, 58 Mich. 72, 24 N. W. 655; *Howard v. Patrick*, 38 Mich. 795; *Smith v. Smith*, 33 Mo. 557; *Towle v. Meserve*, 38 N. H. 9; *Young v. Brick*, 3 N. J. Law, 663; *Dana v. Gill*, 5 J. J. Marsh. (Ky.) 242, 20 Am. Dec. 253; *Burney v. Boone*, 32 Ala. 486; *BOVILL v. HAMMOND*, 6 Barn. & C. 149; *Fromont v. Coupland*, 2 Bing. 170; *Russell v. Ford*, 2 Cal. 86. See "*Partnership*," *Dec. Dig. (Key No.)* §§ 103-110; *Cent. Dig.* §§ 156-172.

<sup>10</sup> *Gammon v. Huse*, 9 Ill. App. 557; *Pitcher v. Barrows*, 17 Pick. (Mass.) 361, 28 Am. Dec. 306; *Fulton v. Williams*, 11 Cush. (Mass.) 108; *Temple v. Seaver*, 11 Cush. (Mass.) 314; *Thayer v. Buffum*, 11 Metc. (Mass.) 398; *Smith v. Lusher*, 5 Cow. (N. Y.) 638; *Crow v. Green*, 111 Pa. 637, 5 Atl. 23; *McFadden v. Hunt*, 5 Watts & S. (Pa.) 468; *Davis v. Merrill*, 51 Mich. 480, 16 N. W. 864; *Hill v. McPher-*

*Same—Actions on Obligations to Partners*

Under the second branch of the rule stated in the black-letter text, a partner whose claim is really against the firm cannot recover any part thereof in an action against one or more of his copartners. This has been held many times in actions for work and labor performed by one partner for the firm,<sup>11</sup> for money loaned the firm,<sup>12</sup> for goods sold to the firm,<sup>13</sup> for money paid for the firm,<sup>14</sup> for rent of premises occupied by the firm,<sup>15</sup> and other similar cases.

son, 15 Mo. 204, 55 Am. Dec. 142; Nevins v. Townsend, 6 Conn. 5; Simrall v. O'Bannons, 7 B. Mon. (Ky.) 608; Smyth v. Strader, 4 How. 404, 11 L. Ed. 1031. See "*Partnership*," *Dec. Dig. (Key No.)* §§ 103-110; *Cent. Dig.* §§ 156-172.

<sup>11</sup> HOLMES v. HIGGINS, 1 Barn. & C. 74; Milburn v. Codd, 7 Barn. & C. 419; Lucas v. Beach, 1 Man. & G. 417, 425; Robinson v. Green's Adm'r, 5 Har. (Del.) 115; Duff v. Maguire, 99 Mass. 300; Younglove v. Liebhardt, 13 Neb. 557, 14 N. W. 526; Stone v. Mattingly (Ky.) 19 S. W. 402; Hills v. Bailey, 27 Vt. 548. See "*Partnership*," *Dec. Dig. (Key No.)* § 106; *Cent. Dig.* § 169.

<sup>12</sup> Colley v. Smith, 2 Moody & R. 96; Perring v. Hone, 4 Bing. 28; Richardson v. Bank of England, 4 Mylne & C. 165; Gridley v. Dole, 4 N. Y. 486; Payne v. Freer, 91 N. Y. 43, 43 Am. Rep. 640; BRACKEN v. KENNEDY, 3 Scam. (Ill.) 558, Gilmore, Cas. Partnership, 470; Sleghortner v. Weissenborn, 20 N. J. Eq. 172; O'Neill v. Brown, 61 Tex. 34; Willson v. Soper, 13 B. Mon. (Ky.) 411, 56 Am. Dec. 573; Mickle v. Peet, 43 Conn. 65. See "*Partnership*," *Dec. Dig. (Key No.)* §§ 103-110; *Cent. Dig.* §§ 156-172.

<sup>13</sup> Course v. Prince, 1 Mill, Const. (S. C.) 416, 12 Am. Dec. 649; Remington v. Allen, 109 Mass. 47; Bullard v. Kinney, 10 Cal. 60. See "*Partnership*," *Dec. Dig. (Key No.)* § 104; *Cent. Dig.* § 164.

<sup>14</sup> Goddard v. Hodges, 1 Crompt. & M. 33; BROWN v. TAPSCOTT, 6 Mees. & W. 119; SADLER v. NIXON, 5 Barn. & Adol. 936, Gilmore, Cas. Partnership, 451; Ledy v. Messinger, 71 Pa. 177; Fessler v. Hickernell, 82 Pa. 150; Harris v. Harris, 39 N. H. 45; Torey v. Twombly, 57 How. Prac. (N. Y.) 149; Ives v. Miller, 19 Barb. (N. Y.) 196; Phillips v. Blatchford, 137 Mass. 510; Lyons v. Murray, 95 Mo. 23, 8 S. W. 170, 6 Am. St. Rep. 17; Glynn v. Phetteplace, 28 Mich. 383; Murray v. Bogert, 14 Johns. (N. Y.) 318, 7 Am. Dec. 466; Booth v. Farmers' & Mechanics' Nat. Bank of Rochester, 74 N. Y. 228; Drew v. Ferson, 22 Wis. 651. See "*Partnership*," *Dec. Dig. (Key No.)* §§ 103-110; *Cent. Dig.* §§ 156-172.

<sup>15</sup> Johnson v. Willson, 54 Ill. 419; Pio Pico v. Cuyas, 47 Cal. 174; Estes v. Whipple, 12 Vt. 373. Cf. Allen v. Anderson, 13 Ill. App. 451; Kinney v. Robison, 52 Mich. 389, 18 N. W. 120. See "*Partnership*," *Dec. Dig. (Key No.)* §§ 103-110; *Cent. Dig.* §§ 156-172.

*Same—Set-Off*

Of course, a claim which cannot be directly enforced by one partner against his copartners, because falling under one or the other branches of the rule here under consideration, cannot be indirectly enforced as a set-off.<sup>16</sup>

**SAME—IN EQUITY**

**154.** An obligation between a firm and one of its members can be enforced only by proceeding in equity for an accounting, except

**EXCEPTION—**Actions at law have been sustained in some states in the following cases:

- (a) Where the partnership has terminated, and the action is for a final, though unascertained, balance (p. 468).
- (b) Where the partnership was for a single finished transaction (p. 470).
- (c) Where the partnership affairs have been adjusted, except as to a single transaction (p. 471).

Since no cause of action exists between partners previous to an accounting upon a partnership claim or liability, if the partners do not voluntarily settle their accounts, the only method of enforcing an obligation between a firm and one of its members is an action for an accounting and settlement of the partnership affairs.<sup>17</sup> "Now, the settlement of all the partnership concerns is ordinarily, during the

<sup>16</sup> *Johnson v. Wilson*, 54 Ill. 419; *Hess v. Final*, 32 Mich. 515; *Gardner v. Fargo*, 58 Mich. 72, 24 N. W. 655; *Elder's Appeal*, 39 Mich. 474; *Hewitt v. Kuhl*, 25 N. J. Eq. 24; *Cummings v. Morris*, 25 N. Y. 625; *Ives v. Miller*, 19 Barb. (N. Y.) 196; *Dodd v. Tarr*, 116 Mass. 287; *Neil v. Greenleaf*, 28 Ohio St. 567; *Linderman v. Disbrow*, 31 Wis. 465; *Tomlinson v. Nelson*, 49 Wis. 679, 6 N. W. 366; *Wharton v. Douglass*, 76 Pa. 273; *Love v. Rhyne*, 86 N. C. 576; *Wood v. Brush*, 72 Cal. 224, 13 Pac. 627; *Young v. Hoglan*, 52 Cal. 466. See "*Partnership*," *Dec. Dig. (Key No.)* § 112; *Cent. Dig.* § 175; "*Set-Off and Counterclaim*," *Dec. Dig. (Key No.)* § 44; *Cent. Dig.* §§ 91-99.

<sup>17</sup> Unless a settlement has been made, and a balance struck, between partners, the remedy, where there are two, is an action of

continuance of the partnership, unattainable at law; and even in equity it is not ordinarily enforced, except upon a dissolution of the partnership. If one partner could recover against his copartners the whole amount paid by him on account of the partnership, they would immediately have a cross action against him for the whole amount or his share thereof; and, if he could recover only their shares thereof, then, in order to ascertain those shares, the full account of all the partnership concerns must be taken, and the partnership itself wound up."<sup>18</sup> "It is a general rule," said Abbott, C. J., in *Bovill v. Hammond*,<sup>19</sup> "that between partners, whether they are so in general or for a particular transaction only, no account can be taken at law."<sup>20</sup> "And in another case it was said: "The remedy in such cases is in equity, where the power to investigate accounts, to compel specific performance, and to restrain breaches of duty for the future, affords the only relief which can be had."<sup>21</sup> The principles governing a partnership accounting in equity will be presently separately discussed.<sup>22</sup>

account; where more than two, a bill in equity. *Beach v. Hotchkiss*, 2 Conn. 425. See *Duncan v. Lyon*, 3 Johns. Ch. (N. Y.) 351, 8 Am. Dec. 513; *Wilhelm v. Caylor*, 32 Md. 151, *Jacobs v. Fountain*, 19 Wend. (N. Y.) 121, and *Appleby v. Brown*, 24 N. Y. 143, for instances and comments upon the common-law action of account. See "*Partnership*," *Dec. Dig. (Key No.)* §§ 103-110, 318; *Cent. Dig.* §§ 156-172, 735-738.

<sup>18</sup> Story, Partn. § 221.

<sup>19</sup> *BOVILL v. HAMMOND*, 6 Barn. & C. 149, 151. See "*Partnership*," *Dec. Dig. (Key No.)* §§ 313-318; *Cent. Dig.* §§ 729-738.

<sup>20</sup> No action at law will lie for the settlement of a partnership account where the number of the partners exceeds two, the only remedy in such case being by bill in chancery. *Beach v. Hotchkiss*, 2 Conn. 425. When a firm consists of only two members, assumpsit lies by one against the other to settle and adjust the partnership affairs. Conn. Revision 1875, tit. 19, c. 7, § 5. The rights of partners inter se can be settled and determined at law as well as in equity. *Wallace v. Hull*, 28 Ga. 68. See "*Partnership*," *Dec. Dig. (Key No.)* §§ 313-318; *Cent. Dig.* §§ 729-738.

<sup>21</sup> *RYDER v. WILCOX*, 103 Mass. 24, 31. Equity has plenary jurisdiction over partnership accountings. *BRACKEN v. KENNEDY*, 3 Scam. (Ill.) 558, *Gilmore, Cas. Partnership*, 470. See "*Partnership*," *Dec. Dig. (Key No.)* § 318; *Cent. Dig.* §§ 735-738.

<sup>22</sup> See post, p. 497.

*Exception—Action for Balance*

It has been held in some states that a balance due on a partnership account may be recovered in an action at law, provided the partnership has terminated, and the judgment will finally settle all questions between the parties growing out of the partnership affairs.<sup>23</sup> This doctrine was firmly established in Massachusetts at a time when there were no courts of equity in that state.<sup>24</sup> It is well stated by Bigelow, J., as follows: "By the well-settled rule of law in this commonwealth, an action may be well maintained by one copartner against another to recover a final balance remaining due upon the close of business of a firm after its dissolution. Nor is it necessary that this should be a fixed ascertained balance as the result of a settlement of the accounts of the firm between the partners. It is enough if it appear that the firm is dissolved, and that there are no outstanding debts due to or from the copartnership, so that the action of assumpsit to recover the balance due one of the firm will effect a final settlement between the copartners."<sup>25</sup> In a much later case, Ames, J., said: "In the case of copartners, neither a settlement of the accounts, nor an express promise to pay, need be proved, where the suit is

<sup>23</sup> *Fry v. Potter*, 12 R. I. 542; *Pettingill v. Jones*, 28 Kan. 749; *Wheeler v. Arnold*, 30 Mich. 304; *Pool v. Perdue*, 44 Ga. 454; *Downs v. Short*, 6 Pennewill (Del.) 264, 68 Atl. 365. A partner cannot obtain judgment against his copartners for a debt due him by the partnership, when it is shown that the partnership accounts are unsettled, and that the judgment asked for will not have the effect of a final liquidation of the partnership affairs. *Austin v. Vaughan*, 14 La. Ann. 43. See "*Partnership*," *Dec. Dig. (Key No.)* §§ 103-110, 318; *Cent. Dig.* §§ 156-172, 735-738.

<sup>24</sup> See *Bond v. Hays*, 12 Mass. 34; *Fanning v. Chadwick*, 8 Pick. 420, 15 Am. Dec. 233; *Brinley v. Kupfer*, 6 Pick. 179; *Williams v. Henshaw*, 11 Pick. 79, 22 Am. Dec. 366; *Rockwell v. Wilder*, 4 Metc. 556; *Shepard v. Richards*, 2 Gray, 424, 61 Am. Dec. 473; *Sikes v. Work*, 6 Gray, 433; *Shattuck v. Lawson*, 10 Gray, 405; *Wheeler v. Wheeler*, 111 Mass. 247, 250; *Wilkins v. Davis*, 15 N. B. R. 60, Fed. Cas. No. 17,664. See "*Partnership*," *Dec. Dig. (Key No.)* §§ 103-110, 318; *Cent. Dig.* §§ 156-172, 735-738.

<sup>25</sup> *Sikes v. Work*, 6 Gray (Mass.) 433, 434. See "*Partnership*," *Dec. Dig. (Key No.)* §§ 103-110, 318; *Cent. Dig.* §§ 156-172, 735-738.

assumpsit for a final balance."<sup>26</sup> It has been held that the remedy in equity given by statute does not affect the application of the rule to cases where the remedy by action at law is plain and adequate.<sup>27</sup> Where there are debts due the partnership outstanding, the action is not for a final balance, and cannot be maintained.<sup>28</sup> But the plaintiff may show that the outstanding debts of the partnership are incapable of collection, and thus that the judgment rendered will be a final settlement between the partners; and in such case, especially if an assignment of all the outstanding debts is seasonably given or tendered to the other party, the action will lie.<sup>29</sup> A partner cannot, however, by himself assuming all the outstanding debts due the firm, without any agreement or notice to his copartner, maintain assumpsit against him for any balance which may be due.<sup>30</sup>

In Georgia it has been held that one partner may sue another at law, and recover if he is able to show that the affairs of the concern are so settled that the jury can ascertain what is justly due him, and settle the rights in dis-

<sup>26</sup> *Wheeler v. Wheeler*, 111 Mass. 247, 250. "It has been held too often now to be questioned that assumpsit will lie to recover a final balance of a partnership account, and that this extends to all cases in which the rendition of the judgment will be an entire termination of the partnership transactions, so that no further cause of action can grow out of them. *Brigham v. Eveleth*, 9 Mass. 538; *Jones v. Harraden*, 9 Mass. 540, note; *Bond v. Hays*, 12 Mass. 34; *Wilby v. Phinney*, 15 Mass. 116; *Fanning v. Chadwick*, 3 Pick. (Mass.) 420, 15 Am. Dec. 233; *Brinley v. Kupfer*, 6 Pick. (Mass.) 179. This rule is not only founded on authority, but is reasonable in principle, and convenient in practice." *Williams v. Henshaw*, 11 Pick. (Mass.) 79, 81, 22 Am. Dec. 366. See "*Partnership*," *Dec. Dig. (Key No.)* §§ 103-110, 318; *Cent. Dig.* §§ 156-172, 735-738.

<sup>27</sup> *Fanning v. Chadwick*, 3 Pick. (Mass.) 420, 15 Am. Dec. 233; *Shepard v. Richards*, 2 Gray (Mass.) 424, 61 Am. Dec. 473. See "*Partnership*," *Dec. Dig. (Key No.)* §§ 103-118, 314, 318; *Cent. Dig.* §§ 156-172, 730, 735-738.

<sup>28</sup> *Williams v. Henshaw*, 11 Pick. (Mass.) 79, 82, 22 Am. Dec. 366. See "*Partnership*," *Dec. Dig. (Key No.)* §§ 103-110, 318; *Cent. Dig.* §§ 156-172, 735-738.

<sup>29</sup> *Id.*

<sup>30</sup> *Williams v. Henshaw*, 12 Pick. (Mass.) 378, 23 Am. Dec. 614. See "*Partnership*," *Dec. Dig. (Key No.)* § 108; *Cent. Dig.* § 157.

pute.<sup>31</sup> So, in a Michigan case, where there were no assets remaining after payment of the debts, it was held that the liability of one partner for money advanced by the other beyond his share of the debts after dissolution was a simple money demand, which could be settled in an action at law.<sup>32</sup> The court said: "There was no occasion for an accounting in equity, unless there had been such dealing with assets, as well as such private relations with the firm, as to make a settlement otherwise difficult; and there being only two partners concerned, and discovery being now obtainable as well at law as in equity, there would seem to be no very good reason why the remedy at law would not be entirely adequate. But, whether this would be difficult or not, it would be admissible to resort to it."

*Same—Partnership in Single Transactions*

In *Pettingill v. Jones*,<sup>33</sup> Brewer, J., said: "Where there is but a single partnership transaction, one joint venture, which is fully closed, we think one partner may maintain an action against the other for his share of the profits of that single transaction, and that in such a case there is no necessity of a formal accounting between parties."<sup>34</sup> In Rhode Island an action to recover one-third of the losses of a land speculation was decided the same way.<sup>35</sup> The court said: "There was no general copartnership, but only

<sup>31</sup> *Pool v. Perdue*, 44 Ga. 454. See "*Partnership*," *Dec. Dig. (Key No.)* §§ 103-110, 318; *Cent. Dig.* §§ 156-172, 735-738.

<sup>32</sup> *Wheeler v. Arnold*, 30 Mich. 304, 306. See "*Partnership*," *Dec. Dig. (Key No.)* § 109; *Cent. Dig.* § 171.

<sup>33</sup> 28 Kan. 749. See, also, *CLARKE v. MILLS*, 36 Kan. 393, 13 Pac. 569, *Gilmore, Cas. Partnership*, 458. See "*Partnership*," *Dec. Dig. (Key No.)* § 108; *Cent. Dig.* § 157.

<sup>34</sup> Citing *Sikes v. Work*, 6 Gray (Mass.) 433; *Wheeler v. Arnold*, 30 Mich. 304. See "*Partnership*," *Dec. Dig. (Key No.)* §§ 103-110, 318; *Cent. Dig.* §§ 156-172, 735-738.

<sup>35</sup> *Fry v. Potter*, 12 R. I. 542, citing *Robson v. Curtis*, 1 Starkie, N. P. 78; *Buckner v. Ries*, 34 Mo. 357; *Wright v. Cumpsty*, 41 Pa. 102. See, also, *Kutz v. Dreibelbis*, 126 Pa. 335, 17 Atl. 609; *Dorwart v. Ball*, 71 Neb. 173, 98 N. W. 652; *LEDFORD v. EMERSON*, 140 N. C. 288, 52 S. E. 641, 4 L. R. A. (N. S.) 130, *Gilmore, Cas. Partnership*, 456. But cf. *Dowling v. Clarke*, 13 R. I. 134. See "*Partnership*," *Dec. Dig. (Key No.)* §§ 103-110, 318; *Cent. Dig.* §§ 156-172, 735-738.

an agreement to share the gains and losses of a particular adventure, the entire capital for which was furnished by the plaintiff's testator. There were no joint debts or liabilities, and no mutual claims subsisting to be adjusted. The transaction was closed, and the losses ascertained. Nothing remained for the defendant to do but pay his share of them. The case is not intrinsically distinguishable from an ordinary case in *assumpsit*, and, even without precedent, we should have little difficulty in maintaining the action." Bates says:<sup>36</sup> "This exception is not clearly established, for some of the cases are not true partnership, but are mere joint ventures. The courts at one time apparently were in the habit of calling any contract relation a partnership in which an accounting could be demanded."

*Same—Single Unadjusted Item*

Where a partnership has been dissolved, and the partners have accounted with each other as to everything except as to one item, one may maintain an action at law against the other for his share of the item.<sup>37</sup>

**SAME—UNDER THE CODE**

**155. The codes of procedure abolishing the distinctions between actions at law and suits in equity do not authorize the maintenance of an action by one partner against his copartner for money due on an unsettled partnership account.**

Under the reformed codes of procedure, there is but one form of action, called a "civil action," and this action embraces all that was formerly comprehended both by actions

<sup>36</sup> Partn. § 865.

<sup>37</sup> *Whetstone v. Shaw*, 70 Mo. 575; *Purvines v. Champion*, 67 Ill. 450; *Farwell v. Tyler*, 5 Iowa, 535; *Brown v. Agnew*, 6 Watts & S. (Pa.) 235. One partner may sue another for his interest in a note when it does not appear from the pleadings that there were any partnership transactions to be settled, except the division of such note. *Moran v. Le Blanc*, 6 La. Ann. 113. See "*Partnership*," *Dec. Dig. (Key No.)* § 108; *Cent. Dig.* § 160.

at law and suits in equity. In equity, a partner could sue his copartner, and obtain an adjustment of the partnership affairs, and thus recover his whole interest therein. He can do the same thing under the code, but the action does not thereby become an action at law; nor can the suit be maintained unless the case made by the pleadings and proof is such as would formerly have called for the interposition of a court of equity. It is, as formerly, an appeal to the power of a court of chancery; and the case will fail if it be not such as gives a right to invoke that power. It is a mistake to suppose that, under the code, a suit may be maintained which must formerly have failed both at law and in equity.<sup>22</sup>

<sup>22</sup> Page v. Thompson, 33 Ind. 137. Under the statutes of Minnesota, one partner cannot demand merely a judgment for money against a copartner any more than he could have maintained an action at law. *Russell v. Minnesota Outfit*, 1 Minn. 162 (Gil. 136). See, also, *CROSBY v. TIMOLAT*, 50 Minn. 171, 52 N. W. 526, *Gillmore. Cas. Partnership*, 469. "By the Code, the distinction between actions at law and suits in equity is abolished. The course of proceeding in both classes of cases is now the same. Whether the action depend upon legal principles or equitable, it is still a civil action, to be commenced and prosecuted without reference to this distinction. But, while this is so in reference to the form and course of proceeding in the action, the principles by which the rights of the parties are to be determined remain unchanged. The Code has given no new cause of action. In some cases parties are allowed to maintain an action who could not have maintained it before; but in no case can such an action be maintained where no action at all could have been maintained before upon the same state of facts. If, under the former system, a given state of facts would have entitled a party to a decree in equity in his favor, the same state of facts now, in an action prosecuted in the manner prescribed by the Code, will entitle him to a judgment to the same effect. If the facts are such as that, at the common law, the party would have been entitled to judgment, he will, by proceeding as the Code requires, obtain the same judgment. The question, therefore, is whether, in the case now under consideration, the facts, as they are assumed to be, would, before the adoption of the Code, have sustained an action at law or a suit in equity." *COLE v. REYNOLDS*, 18 N. Y. 74, 76. Cf. post, p. 473. See "*Partnership*," *Dec. Dig. (Key No.)* §§ 103-110, 318; *Cent. Dig.* §§ 156-172, 735-738.

**ACTIONS BETWEEN FIRMS WITH COMMON  
MEMBER**

- 156. No action at law can be maintained on an obligation between two firms having a common member, but a remedy may be had in equity.**

This rule follows as a corollary to the rule that a partner cannot maintain an action against his copartner upon a partnership claim or liability. The objections to the maintenance of such an action are equally fatal to an action between two firms having a common member. Owing to the nonrecognition of the firm as an entity, such an action, of course, would be one between a partner and his firm on a partnership account, and the fact that there are other copartners does not alter the case in the least. There is the same necessity for taking the partnership accounts, and the same necessity for joining the common partner, both as a plaintiff and as a defendant. The cases are unanimous in holding that, under these circumstances, the action cannot be maintained at law, and they are equally unanimous in holding that a remedy exists in equity. But here the unanimity ceases, and upon the question of how equity will proceed to enforce the rights of the parties the few cases that exist show much confusion and conflict.

The confusion seems to have been caused by the failure to distinguish between the question of what rights equity will enforce, and the entirely distinct question of how those rights will be enforced.<sup>30</sup> The difficulty has been assumed to be merely a technical one, growing out of the common-law rule that all the members of a firm must unite in bringing an action, and the consequent necessity of making the

<sup>30</sup> This distinction was recognized in a recent case, where the action was under the Code. The court said: "At present the question is not how the matter is to be adjusted, or what recovery shall be allowed, but only as to whether the action can be maintained at all." *CROSBY v. TIMOLAT*, 50 Minn. 171, 52 N. W. 526, Gilmore, Cas. Partnership, 469. See "*Partnership*," *Dec. Dig. (Key No.)* §§ 193, 201; *Cent. Dig.* §§ 356, 372.

common partner both a plaintiff and a defendant. But the difficulty lies deeper. It is admirably stated by Mr. James Parsons as follows:<sup>40</sup> "The difficulty, however, does not arise from procedure, and is not obviated by a resort to a remedy in equity."<sup>41</sup> The obstacle is equally formidable in equity. The common member of two firms must be put by the decree in one firm or the other. If he is held a plaintiff, he may be the debtor in the defendant firm, and a decree might enable him to compel his copartners, who are already his creditors in the defendant firm, to pay an additional debt for him. He might collect the debt out of their separate estate, or he might turn around and pay it himself, by setting off his debt, release his copartners defendants, compound the debt, or delay its collection, at his discretion; and the only redress of his plaintiff copartners would be an account. If he is made a defendant, he is excluded from the plaintiff firm by his copartners, although he is entitled to a share of its property, and to a joint control in the business. He is compelled to pay his copartners in the plaintiff firm, not their quota of the claim, but the whole amount, which is more than they could receive if it was his individual debt. They might collect all from him. They might seize and sell his separate estate to pay the debt. He might be a creditor of his copartners, and yet they would collect more out of him, instead of setting off what they owed him in payment of the claim."

Mr. Parsons comes to what seems the only logical conclusion, viz., that the equities of each individual partner must be worked out, although this involves a dissolution

<sup>40</sup> Partn. § 162.

<sup>41</sup> Nor do codes abolishing the distinctions between actions at law and suits in equity obviate the difficulty. They do not profess to create new causes of action. But see post, p. 566, and note 5. Mr. Pollock, speaking of the English statute authorizing suits against partnerships in the firm name, says that such statute does not introduce anything that amounts to the recognition of the firm as an artificial person, distinct from its members, and that actions between a firm and one of its own members, or between two firms having a common member, remain inadmissible in England. Partn. art. 67, pp. 121, 122.

of both firms.<sup>42</sup> In this conclusion he is supported by a writer in the *American Law Review*,<sup>43</sup> and by the case of *Rogers v. Rogers*;<sup>44</sup> and this view is the only one consistent with the rule as to actions between partners all of the same firm, where, as has been seen, the only action, either at law, in equity, or under the code, that a partner can maintain against his copartner upon a partnership obligation, is an action for an accounting and settlement of the affairs of the firm. In the case of *Rogers v. Rogers*, the court says: "If, however, John C. Rogers [the common partner] should refuse to become paymaster to John C. Rogers & Co. [the creditor firm], or be already so far a debtor to that firm that the other members, Hugh Rogers and Lowe, are unwilling to take him alone for the debt of Rogers & Otey, then their course is to stop their business; and, upon the settlement of it, this debt of Rogers & Otey will, as a part of the assets, be allotted to one of the part-

<sup>42</sup> Partn. § 163. In *CROSBY v. TIMOLAT*, 50 Minn. 171, 174, 52 N. W. 526, Gilmore, Cas. Partnership, 469, the court said: "Nor, at law, would the contract or agreement between the two firms having a common member be recognized as creating a legal obligation or cause of action. The transaction would be treated as an attempt by a party to enter into contract with himself. The remedial system of the common law was too inflexible and restricted to enable it to adjust the complex rights and obligations of the parties under such circumstances. But, in equity, the agreements of the members of firms so related to each other were treated as obligatory; and the fact that one of the parties to the joint contract stood in the position of both an obligor and obligee did not stand in the way of affording such relief or remedy as might be found to be appropriate and necessary to the ends of justice." See, in addition to cases cited in this case, *Hall v. Kimball*, 77 Ill. 161; *Beacannon v. Liebe*, 11 Or. 443, 5 Pac. 273; *Aylett v. Walker*, 92 Va. 540, 24 S. E. 226. Where one, who is a member of two firms, makes a note in the name of one of the firms, payable to a member of the other firm, the payee may sue and recover upon it in his own name. *Moore v. Gano*, 12 Ohio, 300. After the death of a person who was partner in two firms, the survivors of one may maintain an action against the survivors of the other partnership. *Lacy v. Le Bruce*, 6 Ala. 804. See "*Partnership*," *Dec. Dig. (Key No.)* §§ 193, 201; *Cent. Dig.* §§ 356, 372.

<sup>43</sup> Volume 5, p. 47.

<sup>44</sup> 40 N. C. 31. See "*Partnership*," *Dec. Dig. (Key No.)* § 193; *Cent. Dig.* § 356.

ners in his share, and he can have relief on his own bill." In this case, the plaintiff, John C. Rogers, was a member of the firm of John C. Rogers & Co., and also of the firm of Rogers & Otey. The latter firm having become indebted to the former, a suit in equity was brought by one firm against the other, as though the two firms were composed of strangers. Ruffin, C. J., before whom the cause came, emphatically denied that such suit could be maintained. "It is unnecessary," he says, "to consider the various matters stated in Otey's answer that might affect the merits of the controversy as between him and the other parties, as it is impossible that there can be any decree for the plaintiffs on this bill. It seems to have been drawn on some vague sort of notion that the firms are in the nature of corporations, and that one of them might have a decree against the other as firms. The bill involves the absurdity of a man's having a personal decree against himself for a sum of money; and that, too, coupled with a decree against another person in such a manner as to enable the supposed creditors to raise the whole debt out of this latter person, although, as between that person and his partner (who is also a partner in the other firm), it might appear, upon taking the accounts of their firm, that the latter holds the fund out of which the debt ought to be paid." "In the present state of things, the court does not see, nor can the accounts be taken that will enable the court to see, who is the proper person to pay, and to receive this money. It may be that John C. Rogers [the common partner] is the hand in the firm of Rogers & Otey from which the money ought to go, and also that in the other firm which ought to hold it. There can therefore be no decree for the plaintiffs. Not one against Otey alone, because no several liability on his part is alleged, nor anything to except John C. Rogers from paying or contributing to payment of the debt; and not one against Rogers by himself, or jointly with Otey, because it would be to pay John C. Rogers himself jointly with others, and for that reason would be repugnant, absurd, and void." <sup>45</sup>

<sup>45</sup> See, also, to same effect, *Englis v. Furniss*, 4 E. D. Smith (N. Y.) 587. And see further, *Taylor v. Thompson*, 176 N. Y. 163, 176,

Mr. Bates states the opposite view as follows: "In equity, however, and under the codes, where equitable remedies will be granted in the courts in all actions, the firms can be parties to such suits much as if they constituted distinct legal bodies, although there is a partner common to each; and hence, under the code, which administers equitable legal remedies without distinction, the suit can be sustained."<sup>46</sup> This is, perhaps, the general statement of the rule by text-writers and judges. It is obviously open to the criticism that it confuses the question of what rights will be recognized in equity, with the question of how those rights will be enforced. The firm can no more sue as such in equity than at law, nor does the code change this rule.<sup>47</sup> However much the fact of partnership may be taken into view in adjusting the rights of the partners, still the suit is one between individuals only. *Cole v. Reynolds*<sup>48</sup> is the leading case in support of this view. Two

68 N. E. 240, 243, where the court declared that, "in an action at law to recover damages for deceit, it is well settled that no action can be maintained between the members of two firms having one member in common." See "*Partnership*," *Dec. Dig. (Key No.)* §§ 193, 201; *Cent. Dig.* §§ 356, 372.

<sup>46</sup> Partn. § 905. In Pennsylvania it is provided by statute that partners may be both plaintiffs and defendants in the same action. Act April 14, 1838 (Pepper & L. Dig. 1894, "*Partnership*," § 3). Speaking of this act Mr. J. Parsons says: "The act does not enable a partner to sue his firm. *Acc. Hall v. Logan*, 34 Pa. 331. An independent plaintiff is required, who is not also liable on the contract which he seeks to enforce. The evil is more extensive than the remedy provided. The limited scope and technical character of the statute make the form of procedure control the right." Partn. § 161. Party joining in promise cannot sue his copromisors. *Price v. Spencer* (1870) 7 Phila. 179; *Wentworth v. Raiguel* (1873) 9 Phila. 275. Cf. *Duff v. Maguire*, 107 Mass. 87, and *Bryant v. Wardell*, 2 Exch. 479. In an action under the statute, where the same person is joined with plaintiff and with defendant, the execution is limited to the joint assets. *Tassey v. Church*, 6 Watts & S. (Pa.) 465, 40 Am. Dec. 575. Cf. *COLE v. REYNOLDS*, 18 N. Y. 74, where practically the same result was reached without any statute. See "*Partnership*," *Dec. Dig. (Key No.)* §§ 193, 201; *Cent. Dig.* §§ 356, 372.

<sup>47</sup> See ante, p. 471.

<sup>48</sup> *COLE v. REYNOLDS*, 18 N. Y. 74. See "*Partnership*," *Dec. Dig. (Key No.)* § 201; *Cent. Dig.* § 372.

firms, in each of which A. was a partner, stated an account of their mutual dealing. The partners in the creditor firm, with the exception of A., who declined to be plaintiff, and was made a defendant, brought their action against the members of the debtor firm; and it was held that, upon proof of these facts, the plaintiffs were entitled to judgment for the balance thus ascertained, and that it was not necessary in such a case that the complaint should propose an accounting as between the firms or the various partners, but that such accounting might be directed by the court if facts were pleaded and shown that would render it inequitable to permit a recovery by one firm against the other, without adjusting the accounts of the individuals composing them. Even in such case the court thought that the better doctrine would be to let the debtor firm pay its debt, and the partners in the creditor firm, after receiving their debt, adjust their individual equities among themselves. The effect of this decision was to hold that two of the partners might have judgment against the debtor firm, including their own copartner, for a debt due to their own firm, the debt so recovered to be held as assets of the firm, and that this might be done without an accounting, except as between the two firms. By such a decree, the common partner is deprived of all possession and control of a portion of the partnership property—a right inherent in the relation of partnership. The court solves the difficulty arising from his being a member of both firms by completely ignoring his rights in the creditor firm, and treating him only as a debtor.

### ACTION AT LAW ON INDIVIDUAL OBLIGATION

157. A partner may maintain an action at law against his copartner upon a claim due to the one from the other as individuals. The following classes of cases fall within the above rule:

- (a) Claims not connected with the partnership (p. 479).
- (b) Claims for an agreed final balance (p. 479).
- (c) Claims upon express personal contracts between partners (p. 481).

**SAME—CLAIMS NOT CONNECTED WITH PARTNERSHIP**

**158. A partner may maintain an action at law against his copartner upon claims not connected with the partnership.**

It is hardly necessary to say that the mere fact that persons are partners as to certain transactions is no defense to an action between them upon a claim in no manner connected with the partnership affairs. As to matters outside of the partnership business, they are not partners, and may sue and be sued precisely as strangers. Thus, where one partner has sold his separate property to his copartner, he may maintain an action at law for the price.<sup>49</sup>

**SAME—CLAIMS FOR AGREED FINAL BALANCES**

**159. A final settlement of the partnership affairs converts the liabilities between each partner and the firm into liabilities between the partners individually, and an action at law lies to recover the balance found due any partner.**

It has been seen that a partner cannot maintain an action at law for a balance on the partnership account until the accounts have been settled and adjusted. But where the partners themselves state the account, and agree upon the balances due any partner, all objection to the maintenance of an action at law is removed. The settlement converts the liabilities between each partner and the firm into liabilities between the parties as individuals, and an action at law may be maintained thereon.<sup>50</sup> To have this effect, however, the

<sup>49</sup> *Elder v. Hood*, 38 Ill. 533; *Hartzell v. Murray*, 224 Ill. 377, 79 N. E. 674. See "Partnership," *Dec. Dig. (Key No.)* § 110; *Cent. Dig.* § 172.

<sup>50</sup> *Downs v. Short*, 6 Pennewill (Del.) 264, 66 Atl. 365; *Purvines v. Champion*, 67 Ill. 450; *Hanks v. Baber*, 53 Ill. 292; *Wycott v.*

settlement must be a final winding up of the partnership affairs.<sup>51</sup> A partial settlement will not support an action at law, unless there is an express promise to pay the balance

Purnell, 10 Iowa, 332; Fanning v. Chadwick, 3 Pick. (Mass.) 420, 15 Am. Dec. 233; Williams v. Henshaw, 11 Pick. (Mass.) 79, 22 Am. Dec. 366; Scott v. Caruth, 50 Mo. 120; Holman v. Nance, 84 Mo. 674; McGinty v. Orr, 110 Mo. App. 336, 85 S. W. 955; Knerr v. Hoffman, 65 Pa. 126; Mackey v. Auer, 8 Hun (N. Y.) 180; Jaques v. Hult, 16 N. J. Law, 38; Nims v. Bigelow, 44 N. H. 376; McGehee v. Dougherty, 10 Ala. 863; WRAY v. MILESTONE, 5 Mees. & W. 21; Halderman v. Halderman, Hemp. 559, Fed. Cas. No. 5,909; Summerson v. Donovan, 110 Va. 657, 66 S. E. 822; Smith v. Putnam, 107 Wis. 155, 82 N. W. 1077, 83 N. W. 288. In the above cases there was no express promise to pay the balance due. In a number of cases it has been said that proof of an express promise to pay the balance is necessary to maintain the suit; but this is not the better view. The following cases hold that there must be an express promise: Davenport v. Gear, 3 Ill. 495; Killam v. Preston, 4 Watts & S. (Pa.) 14.

When parties buying and selling wool together as partners settle their accounts, in which appears an item charging one of them with \$15 "loss on wool," and the latter party expressly assents to the charge, an action is maintainable to recover the amount. In such an action it is no answer that the plaintiff agreed to take the money out in butcher's meat. WRAY v. MILESTONE, 5 Mees. & W. 21.

Where a partnership has been dissolved, and in the settlement one partner has become the owner of the accounts payable to the firm, such partner may maintain an action at law against the other for moneys collected and withheld from him. GLADE v. WHITE, 42 Neb. 336, 60 N. W. 556.

"It is the law that one partner cannot sue another to recover profits or to recover his share of partnership assets where the partnership is unsettled, although he may sue for an accounting and for the recovery of whatever may be found due on a settlement of the partnership affairs. But this rule does not apply to all cases growing out of partnership contracts. Where there is an agreement adjusting partnership affairs, and that agreement awards to one partner a specific sum, or creates a specific duty in his favor, he may maintain an action upon a breach of the duty or promise. Snyder v. Baber, 74 Ind. 47; Warring v. Hill, 89 Ind. 497; Lawrence v. Clark, 9 Dana (Ky.) 257 [35 Am. Dec. 133]; Foster v. Al-

<sup>51</sup> BURNS v. NOTTINGHAM, 60 Ill. 531, Gilmore, Cas. Partnership, 459; Ross v. Cornell, 45 Cal. 133; Arnold v. Arnold, 90 N. Y. 580; De Jarnette's Ex'r v. McQueen, 31 Ala. 230, 68 Am. Dec. 164. See "Partnership," Dec. Dig. (Key No.) §§ 103-110; Cent. Dig. §§ 156-172.

found due.<sup>53</sup> But, where the settlement is a final winding up of the partnership affairs, the law will imply a promise to pay the balance.<sup>54</sup> If, after a final settlement, the business is nevertheless continued, an action cannot be maintained to recover the agreed balance unless there was an express promise to pay it.<sup>54</sup> But where there was an express promise to pay the balance, as where a note is given for the amount found due, an action may be maintained, though the business is carried on.<sup>55</sup>

### SAME—EXPRESS CONTRACTS BETWEEN PARTNERS

**160. A partner may sue his copartner at law upon an express contract between them by which the defendant bound himself personally to the plaintiff.**

Where persons who are partners have contracted together on their own behalf, and not on behalf of their firm, and the transaction is not such a one as the firm would have a right to take advantage of, the rights and obligations

lanson, 2 Term R. 479; Wright v. Hunter, 1 East, 20; Neil v. Greenleaf, 28 Ohio St. 567; Wells v. Carpenter, 65 Ill. 447." Douthitt v. Douthitt, 133 Ind. 26, 32 N. E. 715. Where partners agree, under seal, to dissolve, and that one of them shall have all the debts due the firm, he may maintain general assumpsit against the others for a debt due from them to the firm. Beede v. Fraser, 66 Vt. 114, 28 Atl. 880, 44 Am. St. Rep. 824. See "*Partnership*," Dec. Dig. (Key No.) §§ 103-110; Cent. Dig. §§ 156-172.

<sup>52</sup> Davenport v. Gear, 3 Ill. 495; BURNS v. NOTTINGHAM, 60 Ill. 531, Gilmore, Cas. Partnership, 459; Westerlo v. Evertson, 1 Wend. (N. Y.) 532; Murdock v. Martin, 12 Smedes & M. (Miss.) 681. See "*Partnership*," Dec. Dig. (Key No.) §§ 103-110; Cent. Dig. §§ 156-172.

<sup>53</sup> See cases cited supra, notes 50, 51.

<sup>54</sup> Allan v. Garven, 4 U. C. Q. B. 242; Fromont v. Coupland, 2 Bing. 170. See "*Partnership*," Dec. Dig. (Key No.) §§ 103-110; Cent. Dig. §§ 156-172.

<sup>55</sup> PRESTON v. STRUTTON, 1 Aust. 50; Sturges v. Swift, 32 Miss. 239; McSherry v. Brooks, 46 Md. 103; Rockwell v. Wilder, 4 Metc. (Mass.) 556; Van Amringe v. Ellmaker, 4 Pa. 281. See "*Partnership*," Dec. Dig. (Key No.) §§ 103-110; Cent. Dig. §§ 156-172.

created are individual rights and obligations, and an action at law may be maintained upon the contract.<sup>56</sup> It is immaterial whether the contract relates to the partnership business or not, or whether it was entered into before the partnership was formed, after it was terminated, or during its continuance.<sup>57</sup> The right of the parties to such a contract may be determined without a settlement of the partnership accounts, and does not involve the necessity of making a party both plaintiff and defendant. The fact that a balance may be due the defendant from the plaintiff upon other transactions involving a partnership accounting is immaterial, for, as has been seen, such transactions are not a matter of set-off.<sup>58</sup>

<sup>56</sup> *Bedford v. Brutton*, 1 Bing. N. C. 399; *RYDER v. WILCOX*, 103 Mass. 24. Any partner, ultimately bound for the partnership debts, may sue his copartner to apply the partnership property to such debts. *Gridley v. Conner*, 2 La. Ann. 87. Action at law may be maintained for breach of an express contract between the partners. *Sprout v. Crowley*, 30 Wis. 187. Action at law may be maintained for breach of contract independent of partnership. *Mullany v. Keenan*, 10 Iowa, 224. If a contract, though made concerning the partnership affairs, and in furtherance of the joint undertaking, is the individual contract of the partners who are parties to it, and if it is made by them in their own names, and not in the name of the firm, an action may be maintained thereon by one against the others, during the continuance of the partnership. *Wright v. Michie*, 6 Grat. (Va.) 354. A partner may sue his copartners upon an independent contract made by them as a firm with him before the partnership was formed between him and them. *Mullany v. Keenan*, 10 Iowa, 224. A partner may bring an action against the heirs of his deceased copartner to establish his interest in land belonging to the partnership. *Reemsnyder v. Reemsnyder*, 75 Kan. 565, 89 Pac. 1014. See "Partnership," *Dec. Dig. (Key No.)* § 110; *Cent. Dig.* § 172.

<sup>57</sup> "The real test is, not solely whether the action can be tried without going into the partnership accounts, but whether the defendant has bound himself personally to the plaintiff." *Bates, Partn.* § 878.

<sup>58</sup> A note given by one partner to the other for a balance in liquidation of the affairs of the firm may be the subject of an action at law, although there are subsequent accounts in which the payee may be subsequently found in arrears. *PRESTON v. STRUTTON*, 1 Anstr. 50. There are many deeds of copartnership in which the partners covenant each to advance a certain sum at first. In such

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Where the contract does not relate to the partnership business, the right to maintain an action thereon is clear. But the mere fact that the contract does relate to the partnership business does not alter the case, where the contract was the individual contract of the partners, and not a contract of the firm.<sup>59</sup> Illustrations of cases where actions at law have been allowed on contracts entered into by partners before the formation of the partnership, but relating to it, are numerous. Thus, an action at law will lie for breach of an agreement to form a partnership, or to continue a partnership for a fixed time.<sup>60</sup> Where one partner lends

case an action will lie by one partner against the other to enforce the covenant, notwithstanding that there may be subsequent accounts between them upon which a court of equity must adjudicate. *VENNING v. LECKIE*, 13 East, 7. Where one gives a promissory note to his retiring partner for firm funds advanced by the latter, and used in the business, failure of consideration, based upon the alleged facts that no final settlement of the firm affairs has ever been had, and that upon such settlement there would be nothing due the payee, is no defense to an action at law upon said note. *WILSON v. WILSON*, 26 Or. 251, 38 Pac. 185. One who is clerk, and also in partnership in a particular business with his employer, may, where his duties as clerk and partner are distinct, sue for his salary due him in the former capacity without resorting to a suit for the settlement of the partnership transactions. *Alexander v. Alexander*, 12 La. Ann. 588. A stipulated compensation may be recovered at law, though payable out of profits. *Robinson v. Green's Adm'r*, 5 Har. (Del.) 115. See "*Partnership*," *Dec. Dig. (Key No.)* §§ 103-110; *Cent. Dig.* §§ 156-172.

<sup>59</sup> A promissory note given by one to another member of a commercial company may be sued on by the payee, notwithstanding the relation of parties, and the fact that the money, when recovered, would belong to the company. *VAN NESS v. FORREST*, 8 Cranch, 30, 3 L. Ed. 478. A partner may sell his interest to his copartners, and recover the purchase price in an action at law, and it is immaterial whether such interest is incumbered or not by the terms of the partnership, or whether its amount is fixed or the price agreed on. *Baker v. Robinson*, 55 Mo. App. 171; *Dull v. Reynolds Electric Flasher Mfg. Co. (C. C.)* 161 Fed. 129. See, also, *supra*, notes 56-58. See "*Partnership*," *Dec. Dig. (Key No.)* § 107; *Cent. Dig.* § 170.

<sup>60</sup> The remedy for violation of an agreement for a future partnership is exclusively at law. *Lane v. Roche, Riley, Eq. (S. C.)* 215. See *Gale v. Leckie*, 2 Starkie, 107; *Wilson v. Campbell*, 10 Ill. 383; *OWEN v. MERONEY*, 136 N. C. 475, 48 S. E. 821, 103 Am.

another money to be used by the latter as his contribution to capital, the transaction is purely an individual one, and the money may be recovered in an action at law.<sup>61</sup> Where there is an agreement to buy a half interest in a stock of goods, and to enter into partnership with the seller, the interest bought to be put in as capital, the purchase price may be recovered at law. The purchase is not a partnership transaction. The interest must be purchased before it can be put in as capital.<sup>62</sup> So, one partner may sue his copartner at law, and recover a premium promised by the latter to procure admission to the firm.<sup>63</sup>

An action at law between partners will lie for breach of an agreement to pay firm debts out of defendant's private funds, or to indemnify plaintiff from all liability thereon,<sup>64</sup>

St. Rep. 952, Gilmore, Cas. Partnership, 461; Hill v. Palmer, 56 Wis. 123, 14 N. W. 20, 43 Am. Rep. 703; Vance v. Blair, 18 Ohio, 532, 51 Am. Dec. 467; Goldsmith v. Sachs (C. C.) 17 Fed. 726, Westwood v. Cole, 66 Misc. Rep. 53, 120 N. Y. Supp. 884; Ramsay v. Meade, 37 Colo. 465, 86 Pac. 1018; Hobbs v. Ray, 96 S. W. 539, 29 Ky. Law Rep. 999. See, also, cases cited in note 67, *infra*. An action lies to recover damages for a wrongful dissolution. Dart v. Laimbeer, 107 N. Y. 664, 14 N. E. 291; Bagley v. Smith, 10 N. Y. 489, 61 Am. Dec. 756; Dunham v. Gillis, 8 Mass. 462; Reiter v. Morton, 96 Pa. 229; Addams v. Tutton, 39 Pa. 447; Wadsworth v. Manning, 4 Md. 59; Jones v. Morehead, 3 B. Mon. (Ky.) 377. See "*Partnership*," *Dec. Dig. (Key No.)* § 105; *Cent. Dig.* § 168.

<sup>61</sup> HELME v. SMITH, 7 Bing. 709, 714, Gilmore, Cas. Partnership, 84. An action at law can be maintained by one partner against another partner in the same firm, upon an express promise, made before the commencement of the partnership, in respect to advances to be made to constitute the capital of the company for the carrying on of the business of the partnership. Currier v. Webster, 45 N. H. 226. See, also, to like effect, Smith v. Kemp, 92 Mich. 357, 52 N. W. 639; Bates v. Lane, 62 Mich. 132, 28 N. W. 753; Bull v. Coe, 77 Cal. 54, 18 Pac. 808, 11 Am. St. Rep. 235. See "*Partnership*," *Dec. Dig. (Key No.)* §§ 105, 107; *Cent. Dig.* §§ 168, 170.

<sup>62</sup> Kinney v. Robison, 52 Mich. 389, 18 N. W. 120. See "*Partnership*," *Dec. Dig. (Key No.)* §§ 105, 107, 110, 112; *Cent. Dig.* §§ 168, 170, 172, 175.

<sup>63</sup> Walker v. Harris, 1 Anstr. 245. See "*Partnership*," *Dec. Dig. (Key No.)* §§ 105, 107, 110; *Cent. Dig.* §§ 168, 170, 172.

<sup>64</sup> Schmidt v. Glade, 126 Ill. 485, 18 N. E. 762; Shennefeld v. Dutton, 85 Ill. 503; Kellogg v. Moore, 97 Ill. 282; Adams v. Funk, 53 Ill. 219; Halliday v. Carman, 6 Daly (N. Y.) 422; Cilley v. Van

for breach of agreement to pay for personal services out of private funds,<sup>66</sup> and for breach of agreement to render accounts.<sup>66</sup> "An agreement to pay money or to furnish stock for the purpose of launching the partnership is an individual engagement of each partner to the other, and the defaulting partner may be sued in an action at law upon his agreement. It is entirely separate and distinct from the partnership accounts, and this forms the true test in determining whether an action at law will lie by one partner against his copartner."<sup>67</sup> A suit by a partner against his copartner, upon a

Patten, 58 Mich. 404, 25 N. W. 326; Jewell v. Ketchum, 63 Wis. 628, 23 N. W. 709; Frow's Estate, 73 Pa. 459; Edwards v. Remington, 51 Wis. 336, 8 N. W. 193; Miller v. Bailey, 19 Or. 539, 25 Pac. 27. A promise by a continuing partner to reimburse a retiring partner for taking up, by his individual note, a partnership note on which the latter is still liable, but which the former has at the dissolution promised to pay, will sustain an action; a demand, whether necessary or not, having been first made. Warbritton v. Cameron, 10 Ind. 302. Generally, as to breach of contract assuming debt, Ferguson v. Baker, 116 N. Y. 257, 22 N. E. 400; Thropp v. Richardson, 132 Pa. 399, 19 Atl. 218. A bond given on the dissolution of a firm by one partner for the payment of all the firm debts can be enforced only by the obligee. When one partner indebted to the firm gives his note to the other therefor, it is a valid counterclaim or set-off in an action on a bond executed upon dissolution of the firm by the payee to the maker for the payment of the partnership debts. MERRILL v. GREEN, 55 N. Y. 270. See "Partnership," Dec. Dig. (Key No.) §§ 105, 107, 110; Cent. Dig. §§ 168, 170, 172.

<sup>66</sup> *Palne v. Thacher*, 25 Wend. (N. Y.) 450; *Aldrich v. Lewis*, 60 Miss. 229. See "Partnership," Dec. Dig. (Key No.) § 106; Cent. Dig. § 169.

<sup>66</sup> *Owston v. Ogle*, 13 East, 538; *Foster v. Allanson*, 2 Term R. 479; *Want v. Reece*, 1 Bing. 18; *Ferguson v. Baker*, 116 N. Y. 257, 22 N. E. 400; *Duncan v. Lyon*, 3 Johns. Ch. (N. Y.) 351, 8 Am. Dec. 513; *Gillen v. Peters*, 39 Kan. 489, 18 Pac. 613; *Wilby v. Phinney*, 15 Mass. 116; *Holyoke v. Mayo*, 50 Me. 385; *Bailey v. Starke*, 6 Ark. 191; *Rose v. Roberts*, 9 Minn. 119 (Gil. 109). But see *McPherson v. Robertson*, 82 Ala. 459, 2 South. 333. See "Partnership," Dec. Dig. (Key No.) §§ 103-110; Cent. Dig. §§ 156-172.

<sup>67</sup> *COOK v. CANNY*, 96 Mich. 398, 55 N. W. 987, *Gilmore, Cas. Partnership*, 462. One partner may sue another at law on a note given by the latter to the former for the payment of a part of the capital stock. *Grigsby's Ex'r v. Nance*, 3 Ala. 347; *Scott v. Campbell*, 30 Ala. 728. See, also, *Sprout v. Crowley*, 30 Wis. 187; *BROWN v. TAPSCOTT*, 6 Mees. & W. 119. If, by an agreement under seal

claim not founded on the plaintiff's interest in the partnership assets, but arising from a direct violation of the articles of copartnership, need not be delayed for the taking of an account of the partnership affairs.<sup>68</sup> A partner satisfying a judgment against himself upon an indorsement made by his copartner in violation of the articles, is entitled to reimbursement for the costs paid in such satisfaction, as well as for the amount of the judgment otherwise.<sup>69</sup>

Partners may, by special agreement touching any part of

between two persons, one agrees to furnish a specified sum of money to carry on a certain business of the parties, and afterwards fails to furnish the money, he is liable to the other at law for such breach of contract. *Ellison v. Chapman*, 7 Blackf. (Ind.) 224. See, also, cases cited in note 60, *supra*. See "Partnership," *Dec. Dig. (Key No.)* § 105; *Cent. Dig.* § 168.

<sup>68</sup> *Read v. Nevitt*, 41 Wis. 348; *Hill v. Palmer*, 56 Wis. 123, 14 N. W. 20, 43 Am. Rep. 703; *Moritz v. Peebles*, 4 E. D. Smith (N. Y.) 135; *Kinloch v. Hamlin*, 2 Hill. Eq. (S. C.) 19, 27 Am. Dec. 441; *Dunham v. Gillis*, 8 Mass. 462; *Hunt v. Reilly*, 50 Tex. 99; *Dana v. Gill*, 5 J. J. Marsh. (Ky.) 242, 20 Am. Dec. 255; *Radenhurst v. Bates*, 3 Bing. 463. But see *Stone v. Fouse*, 3 Cal. 292; *Ridgway v. Grant*, 17 Ill. 117. An action at law may be sustained by one copartner against another to recover damages for a breach of the articles or terms of the contract. *Terry v. Carter*, 25 Miss. 168; *Kinloch v. Hamlin*, 2 Hill. Eq. (S. C.) 19, 27 Am. Dec. 441. One partner cannot maintain an action at law on the covenants in the articles of copartnership to recover damages of his copartner for neglect of the partnership business, while there is a considerable amount due from him to his copartner, and the debts due by and to the firm, the burden of which is to be borne, and the benefit enjoyed, by the partners in certain proportions, are not all settled. *Capen v. Barrows*, 1 Gray (Mass.) 376. See, also, *Paterson v. Burton*, 3 N. J. Law, 717; *BRACKEN v. KENNEDY*, 3 Scam. (Ill.) 558, *Gilmore, Cas. Partnership*, 470. A suit at law may be maintained for a breach of partnership articles where the business of the partnership has not been commenced, and there are no accounts in dispute between the partners. *Vance v. Blair*, 18 Ohio, 532, 51 Am. Dec. 467. Where one partner has made profits, by engaging in any other business in violation of his contract, his copartner has his option to sue for damages for the breach of the contract, or to bring a bill in equity to compel an accounting. *Moritz v. Peebles*, 4 E. D. Smith (N. Y.) 135. See "Partnership," *Dec. Dig. (Key No.)* §§ 105, 108; *Cent. Dig.* §§ 157, 168.

<sup>69</sup> *Stone v. Wendover*, 2 Mo. App. 248. See "Partnership," *Dec. Dig. (Key No.)* § 105; *Cent. Dig.* § 168.

the partnership's concerns, withdraw the same from the partnership account, and make the agreement the foundation of an action at law. Thus, where one of two partners, by agreement between them, takes certain specific articles of partnership property, and agrees to pay his copartner for his share thereof a definite sum, at a specified time, the copartner may maintain an action to recover the amount so agreed to be paid, independent of the settlement of the partnership accounts.<sup>70</sup>

<sup>70</sup> *Neil v. Greenleaf*, 28 Ohio St. 567; *Simpson v. Miller*, 51 Or. 232, 94 Pac. 567; *JACKSON v. STOPHERD*, 2 Crompt. & M. 361, *Gilmore, Cas. Partnership*, 452. See, also, *Roberts v. Ripley*, 14 Conn. 543; *Russell v. Grimes*, 46 Mo. 410; *Adams v. Funk*, 53 Ill. 219; *Collamer v. Foster*, 26 Vt. 754.

Where one partner purchases the interest of the other partner in the concern, for the sale dissolves the partnership, and the partner purchasing may be sued for the amount agreed to be paid by him for such interest. *Edens v. Williams*, 36 Ill. 252.

As to conversion of partnership property into separate property, see ante, §§ 56-62, pp. 176-195.

Where partners agree to divide a partnership debt, and the debtor assents to it, and promises one of the partners to pay him his moiety, such partner may maintain an action for his moiety against the debtor. 1 *Lindl. Partn.* 265, citing *Blair v. Snover*, 10 N. J. Law, 153.

*Assumpsit* lies where, after dissolution and settlement, one partner received more than was his due. *Bond v. Hays*, 12 Mass. 34. And see *Clark v. Dibble*, 16 Wend. (N. Y.) 601; *Beede v. Fraser*, 66 Vt. 114, 28 Atl. 880, 44 Am. St. Rep. 824.

"Upon the general rule of law, there is no difficulty. One partner cannot maintain an action for a balance on the partnership accounts until the accounts have been settled and adjusted, and until it is ascertained what is the balance due from the partner against whom the claim is made; but there may be special bargains by which particular transactions are isolated and separated from the winding up of the concern, and are taken out of the general law of partnership. When we consider the circumstances of this case, plaintiff's right of action may be put upon the footing of a separate transaction." *Bayley, B.*, in *JACKSON v. STOPHERD*, 2 Crompt. & M. 361, 365, *Gilmore, Cas. Partnership*, 452.

Partners may separate any portion of their partnership affairs from the rest, and submit it to arbitrators for adjustment; and, if a sum is found due from one to the other, a promise to pay that sum is binding, and an action may be sustained upon it, notwithstanding the other partnership concerns remain unsettled. *Gib-*

### SAME—LOSSES CAUSED BY PARTNER'S WRONG

161. A partner may maintain an action at law against his copartner for a loss caused by the latter's wrongful act, provided,
- (a) The plaintiff's loss was suffered individually, and not in his capacity as a partner, and
  - (b) The defendant would not have been entitled to contribution had he alone paid the loss.

Where one partner commits a distinct tort against his copartner, in no way connected with the partnership business, he is liable in an action at law as any one else would be.<sup>71</sup> Thus, when one partner injures the separate property of his copartner used in the firm business, he is liable in an action at law.<sup>72</sup> But the wrongful act may be in some way connected with the partnership, and still it may create an individual liability to his copartner, enforceable at law. Thus, fraud in inducing another to enter into a partnership

son v. Moore, 6 N. H. 547. When a firm has been dissolved, and one partner has assumed the entire control of the goods, an action may be brought by such partner against another partner to whom he has sold a portion of the goods, at the other's request, and on a promise to pay him, and not the firm. Caswell v. Cooper, 18 Ill. 532. An action at law is maintainable by one partner against another upon a promissory note executed by the one to the other, involving particular items or transactions of the partnership business. WILSON v. WILSON, 26 Or. 251, 38 Pac. 185. See "Partnership," *Dec. Dig. (Key No.)* §§ 103-110; *Cent. Dig.* §§ 156-172.

<sup>71</sup> Pierce v. Thompson, 6 Pick. (Mass.) 193; Gilliam v. Loeb, 131 Mo. App. 70, 109 S. W. 835; Queen v. Mallinson, 16 Q. B. 367. See CROCKETT v. BURLESON, 60 W. Va. 252, 54 S. E. 341, 6 L. R. A. (N. S.) 263, Gilmore, *Cas. Partnership*, 464, where the court held that a partnership settlement procured by fraud of a partner is ground for an action for deceit, without rescinding the settlement. See "Partnership," *Dec. Dig. (Key No.)* §§ 104, 110; *Cent. Dig.* §§ 163, 167.

<sup>72</sup> Haller v. Willamowicz, 23 Ark. 566; NEWBY v. HARRELL, 99 N. C. 149, 5 S. E. 284, 6 Am. St. Rep. 503; Newberry v. Gibson, 125 Iowa, 575, 101 N. W. 428. See "Partnership," *Dec. Dig. (Key No.)* § 104; *Cent. Dig.* § 163.

is actionable at law.<sup>73</sup> So, where a partner, in fraud of his copartners, gives a note in the name of the firm for a private debt of his own, he is liable to his copartners in an action at law for the amount they have been compelled to pay.<sup>74</sup> But, if the note should be paid out of firm assets, it is apprehended that an action at law would not lie; for, until an accounting and settlement of the partnership affairs, it is impossible to say what, if anything, the plaintiff has suffered.<sup>75</sup> Non constat the wrongdoing partner may

<sup>73</sup> *Boughner v. Black's Adm'r*, 83 Ky. 521, 4 Am. St. Rep. 174; *Rice v. Culver*, 32 N. J. Eq. 601; *Morse v. Hutchins*, 102 Mass. 439; *Perry v. Hale*, 143 Mass. 540, 10 N. E. 174; *More v. Rand*, 60 N. Y. 208; *GLADE v. WHITE*, 42 Neb. 336, 60 N. W. 556. See "*Partnership*," *Dec. Dig. (Key No.)* §§ 104, 107, 108; *Cent. Dig.* §§ 163, 165-167.

<sup>74</sup> *Calkins v. Smith*, 48 N. Y. 614, 8 Am. Rep. 575, usually cited in support of this proposition, is not an action against a partner at all. All it really decided is that the fraud is not upon the firm, but upon the innocent partners, and that the cause of action arising therefrom is no part of the partnership assets. It does not decide that one partner may maintain an action at law without an accounting, where the note was paid out of partnership assets. See, also, *T. Pars. Partn.* § 203; *Cross v. Cheshire*, 7 Exch. 43; *Osborne v. Harper*, 5 East, 225. See "*Partnership*," *Dec. Dig. (Key No.)* § 104; *Cent. Dig.* §§ 163, 167.

<sup>75</sup> *Sweet v. Morrison*, 103 N. Y. 235, 240, 8 N. E. 396, was an action by one partner against his copartner to recover damages for fraud practiced upon him by them in the discharge of a debt due the partnership from a third person. The court held that, while defendants were liable for damages so caused, a partnership settlement was necessary. The court said: "Sweet may recover, not the debt due to the firm, for that is discharged, but damages for the fraud practiced upon him in the process. This is his individual right, and the resultant damages can only be measured by his individual loss; and that loss, if it exists at all, must necessarily be, and can only be, a diminution of his partnership share, produced by a collusive waste of partnership assets. But he has not proved any such loss. It cannot be known, until a settlement of the partnership accounts, what loss has resulted from the fraud. Payson, Canda & Co. are not bound to pay Sweet's firm or Sweet's partners anything. Primarily, the action is by Sweet against his copartners for a partnership settlement, in which he charges them with the willful and fraudulent waste of a valuable claim, and holds the debtors responsible also by reason of their collusive participation. That is the sole theory upon which the action can be maintained. To Sweet's partners, and to his firm, nothing is due from Payson,

be found entitled to the whole of the partnership assets upon an accounting. So, also, one partner cannot maintain an action at law against his copartner for neglect of the partnership business, because the loss is suffered, not individually, but through the diminution of the partnership assets. Until a settlement of the partnership accounts, the damage cannot be ascertained.<sup>76</sup> In some cases, as has been seen, a partner is entitled to contribution to a loss, although caused by his own wrong.<sup>77</sup> In such a case, if any partner pays more than his share, he, nevertheless, cannot recover it in an action at law against any of his copartners.<sup>78</sup> Obviously, if one partner is entitled to contribution from his copartners, he cannot be regarded as a wrongdoer as to them. Equally obvious is it that a partnership accounting would be necessary to ascertain whether any partner had, in fact, paid more than his share, and, if so, how much.

Canda & Co., and they can be compelled to pay only what is needed to perfect Sweet's rights, as disclosed by an honest settlement." See, also, *Fuller v. Percival*, 126 Mass. 381; *Emery v. Parrott*, 107 Mass. 95; *Osborne v. Harper*, 5 East, 225. As to rights against third persons, growing out of a partner's wrongdoing, see post, p. 560. See "*Partnership*," *Dec. Dig. (Key No.)* §§ 103-110; *Cent. Dig.* §§ 156-172.

<sup>76</sup> *Capen v. Barrows*, 1 Gray (Mass.) 376. See, also, cases cited in note 68, supra. That one partner fraudulently converts to his own use property supplied by another for the partnership use dissolves the partnership, or, at least, gives the injured party a legal right of action. *Crosby v. McDermitt*, 7 Cal. 146. Where one partner mixed partnership funds with his own, made deposits of them in bank in his own name, appropriated them to his own use, assuming the absolute and entire control, and the bank, becoming insolvent, received its notes, and had them registered in his own name, without the consent or knowledge of his copartner, by reason whereof the partnership funds were lost, held, that such partner was responsible to the copartner for his share of the fund, and must bear the loss alone. *Lefever v. Underwood*, 41 Pa. 505. See "*Partnership*," *Dec. Dig. (Key No.)* § 104; *Cent. Dig.* § 163.

<sup>77</sup> Ante, § 132, p. 383.

<sup>78</sup> *Story*, Partn. § 220; *Pearson v. Skelton*, 1 Mees. & W. 504. See "*Partnership*," *Dec. Dig. (Key No.)* § 109; *Cent. Dig.* § 171.

## EQUITABLE ACTIONS IN GENERAL—JURISDICTION

162. The jurisdiction of equity over partnership affairs is governed by ordinary principles, but, owing to the complex nature of the relation, equity has come to be the chief tribunal for the settlement of partnership controversies.

We have seen in what cases an action at law can be maintained between partners. It may be stated as a general rule that in all other cases equity has jurisdiction to grant the appropriate relief. The exercise of jurisdiction is governed by ordinary principles. Equity will not interfere where there is a plain adequate remedy at law, but the nature of a partnership is such that the questions arising between partners almost always fall within the recognized rules governing the jurisdiction of courts of equity.<sup>79</sup>

### *General Rules as to Interference between Partners*

There are three general rules by which courts of equity are influenced when their interference is sought by one partner against another, and to which it will be convenient at once to refer; for the same rules are observed in all actions for specific performance, for an account, for a receiver, for an injunction, and in those actions for fraud in which equitable relief, as distinguished from the simple recovery of damages, is sought. The rules in question, however, have no application to cases in which one partner may sue another at law. The rules alluded to are (1) not to interfere except with a view to dissolve the partnership; (2)

<sup>79</sup> Generally, as to jurisdiction of equity over partnerships, see Story, Eq. Jur. § 668; Bisp. Eq. § 505; Christy's Appeal, 92 Pa. 157; Epping v. Aiken, 71 Ga. 682; BRACKEN v. KENNEDY, 3 Scam. (Ill.) 558, Gilmore, Cas. Partnership, 470; Daniel v. Gillespie, 65 W. Va. 366, 64 S. E. 254; Bruns v. Helse, 101 Md. 163, 60 Atl. 604. See "Partnership," Dec. Dig. (Key No.) §§ 103-110, 193, 194; Cent. Dig. §§ 156-172, 355-357.

not to interfere in matters of internal regulation; (3) not to interfere at the instance of persons who have been guilty of laches.

### **SAME—NECESSITY OF PRAYING FOR A DISSOLUTION**

**163.** The old rule not to interfere except with a view to a dissolution has been much relaxed, but not to the extent of requiring equity to undertake the management of a going concern.<sup>80</sup>

Formerly, courts of equity were averse to interfering at all between one partner and another, unless it was for the purpose of dissolving the partnership; or, if it was dissolved already, of finally winding up its affairs. Hence it will be found, on reference to the older reported decisions, that, if a dissolution was not sought, the court would not decree a partnership account, nor restrain a partner from infringing the partnership articles, nor protect the partnership assets from destruction or waste. This rule, at no time perhaps very inflexible, has gradually been relaxed; it having been discovered to be more conducive to justice to interfere to prevent some definite wrong, or to redress some particular grievance, than to decline to interfere at all unless complete justice can be done by winding up the partnership, and in that manner settling all disputes. At the same time, so difficult is it to shake off old associations, and to run counter to established rules, that traces of the aversion alluded to may yet be found in the decisions of the courts; and especially in those which relate to the specific performance of agreements to form partnerships, and in those which relate to the appointment of receivers and managers. Indeed, notwithstanding the extent to which the rule has been relaxed in actions for an account, or for an injunction, one of the first points for consideration, even

<sup>80</sup> The text of sections 163 to 171 is substantially that of Mr. Lindley, with late American cases. See *Lindl. Partn.* pp. 465-479.

now, when one partner sues another for equitable relief, is, can relief be had without dissolving the partnership? Undoubtedly, it may, much more certainly than formerly, but not always when perhaps it ought.

*Modern Rule*

Without stopping to inquire how the question is to be answered in any particular case, it may be stated as a general proposition that courts will not, if they can avoid it, allow a partner to derive advantage from his own misconduct by compelling his copartner to submit either to continued wrong or to a dissolution;<sup>81</sup> and that, rather than permit an improper advantage to be taken of a rule designed to operate for the benefit of all parties, courts will interfere in modern times where formerly they would have declined to do so.<sup>82</sup> At the same time, courts will not take the management of a going concern into their own hands, and, if they cannot usefully interfere in any other manner, they will not interfere at all, unless for the purpose of winding up the partnership.

**SAME—NONINTERFERENCE IN MATTER OF INTERNAL REGULATION**

**164. A court of equity will not interfere in a matter of merely internal regulation.**

A court of justice will not interfere between partners merely because they do not agree.<sup>83</sup> It is no part of the

<sup>81</sup> *Fairthorne v. Weston*, 3 Hare, 387, 392; *Hogan v. Walsh*, 122 Ga. 283, 50 S. E. 84; *Bond v. May*, 38 Ind. App. 396, 78 N. E. 260; *LORD v. HULL*, 178 N. Y. 9, 70 N. E. 69, 102 Am. St. Rep. 484, *Gilmore, Cas. Partnership*, 472. See "*Partnership*," *Dec. Dig. (Key No.)* § 315; *Cent. Dig.* § 731.

<sup>82</sup> *Davis v. Davis*, 60 Miss. 615; *Traphagen v. Burt*, 67 N. Y. 80. See "*Partnership*," *Dec. Dig. (Key No.)* § 315; *Cent. Dig.* § 731.

<sup>83</sup> But see *Davis v. Davis*, 60 Miss. 615; *PIRTLE v. PENN*, 3 Dana (Ky.) 247, 28 Am. Dec. 70, *Gilmore, Cas. Partnership*, 480. See "*Partnership*," *Dec. Dig. (Key No.)* §§ 272, 315; *Cent. Dig.* §§ 619, 731.

duty of the court to settle all partnership squabbles; it expects from every partner a certain amount of forbearance and good feeling towards his co-partner; and it does not regard mere passing improprieties, arising from infirmities of temper, as sufficient to warrant a decree for dissolution, or an order for an injunction, or a receiver.<sup>84</sup> And, when partners have themselves agreed that the management of their affairs shall be intrusted to one or more of them exclusively, the court will not remove the managers, or interfere with them, unless they are clearly acting illegally, or in breach of the trust reposed in them.<sup>85</sup> The rule not to interfere in matters of merely internal regulation or discipline is strongly exemplified in cases of clubs.<sup>86</sup>

### SAME—EFFECT OF LACHES

#### 165. Equity will not interfere at the instance of persons who have been guilty of laches.

##### *Laches a Bar to Relief in Equity*

Independently of the statute of limitations, a plaintiff may be precluded by his own laches from obtaining equitable relief. Laches presupposes not only lapse of time, but also the existence of circumstances which render negligence imputable; and, unless reasonable vigilance is shown in the prosecution of a claim to equitable relief, the court, acting

<sup>84</sup> *Marshall v. Colman*, 2 Jac. & W. 266; *Anderson v. Anderson*, 25 Beav. 190; *Smith v. Jeyes*, 4 Beav. 503; *Cofton v. Horner*, 5 Price, 537. *LORD v. HULL*, 178 N. Y. 9, 70 N. E. 69, 102 Am. St. Rep. 484, *Gilmore, Cas. Partnership*, 472; *BUCK v. SMITH*, 29 Mich. 166, 18 Am. Rep. 84, *Gilmore, Cas. Partnership*, 479. See, also, post, chapter X., § 202, p. 585. See "*Partnership*," *Dec. Dig. (Key No.)* §§ 272, 324, 325; *Cent. Dig.* §§ 619, 755, 757-767.

<sup>85</sup> *Lawson v. Morgan*, 1 Price, 303; *Waters v. Taylor*, 15 Ves. 10. See "*Partnership*," *Dec. Dig. (Key No.)* §§ 103-110, 272, 315; *Cent. Dig.* §§ 156-172, 619, 731.

<sup>86</sup> *Foss v. Harbottle*, 2 Hare, 461; *Gorman v. Russell*, 14 Cal. 531; *Burke v. Roper*, 79 Ala. 138; *Mozley v. Alston*, 1 Phil. Ch. 790; *Carlen v. Drury*, 1 Ves. & B. 154. See "*Clubs*," *Dec. Dig. (Key No.)* §§ 12-14; *Cent. Dig.* §§ 8, 9; "*Associations*," *Dec. Dig. (Key No.)* §§ 20, 21; *Cent. Dig.* §§ 36-44.

on the maxim, "Vigilantibus non dormientibus subveniunt leges," will decline to interfere.<sup>87</sup>

*To a Suit for an Account*

In the early case of *Sherman v. Sherman*,<sup>88</sup> two persons had dealings as merchants. One of them died. His widow filed a bill for an account, but, although the statute of limitations did not apply, the bill was dismissed, on the ground that many years had elapsed since the dealings in question had taken place, and the deceased had allowed any claims he might have had to slumber.<sup>89</sup>

*Acquiescence in Account*

Again, where an account has been rendered, and has been long acquiesced in, unless fraud be proved, a court will not reopen it, although the account may be shown to be erroneous, and although no final settlement was ever come to.<sup>90</sup> The same principle is acted on in taking accounts; for charges long improperly made and acquiesced in, or long

<sup>87</sup> *Evans v. Smallcombe*, L. R. 3 H. L. 249, 256; *Groenendyke v. Coffeen*, 109 Ill. 325; *Drew v. Beard*, 107 Mass. 64; *Stout v. Seabrook's Ex'rs*, 30 N. J. Eq. 187; *Richards v. Todd*, 127 Mass. 167; *Hoyt v. Sprague*, 103 U. S. 613, 28 L. Ed. 585; *Pond v. Clark*, 24 Conn. 370. See "*Equity*," *Dec. Dig. (Key No.)* §§ 67-88; *Cent. Dig. §§ 191-245*; "*Partnership*," *Dec. Dig. (Key No.)* §§ 114, 321; *Cent. Dig. §§ 177, 745*.<sup>\*</sup>

<sup>88</sup> 2 Vern. 276. See "*Partnership*," *Dec. Dig. (Key No.)* § 321; *Cent. Dig. § 745*.

<sup>89</sup> See, also, *Sturt v. Mellish*, 2 Atk. 610. In *McPherson v. Swift*, 22 S. D. 165, 116 N. W. 76, 133 Am. St. Rep. 907, it was held that a delay of ten years after dissolution to bring an action for an accounting was not such laches as to bar plaintiff, in the absence of a showing of prejudice to the defendant. To the same effect *Stehn v. Hayssen*, 124 Wis. 583, 102 N. W. 1074; *Sterling v. Chapin*, 102 App. Div. 589, 92 N. Y. Supp. 904; *Stuart v. Harmon*, 72 S. W. 365, 24 Ky. Law Rep. 1829; *Compton v. Thorn*, 90 Va. 653, 19 S. E. 451. See "*Partnership*," *Dec. Dig. (Key No.)* §§ 311, 321; *Cent. Dig. §§ 722, 745*.

<sup>90</sup> *Scott v. Milne*, 5 Beav. 215, on appeal 7 Jur. 709; *Bell v. Hudson*, 73 Cal. 285, 14 Pac. 791, 2 Am. St. Rep. 791; *Hite's Heirs v. Hite's Ex'rs*, 1 B. Mon. (Ky.) 177; *Coleman v. Marble*, 9 La. Ann. 476; *Oliver v. House*, 125 Ga. 637, 54 S. E. 732. See "*Partnership*," *Dec. Dig. (Key No.)* §§ 311, 321; *Cent. Dig. §§ 722, 745*.

omitted to be made, and known so to be, are regarded, in the absence of fraud, as having been made or omitted by agreement, and the question of mistake will not be gone into.<sup>91</sup>

*Laches in Enforcing Agreements for Partnerships*

The doctrine of laches is of great importance where persons have agreed to become partners, and one of them has unfairly left the other to do all the work, and then, there being a profit, comes forward, and claims a share of it. In such cases as these, the plaintiff's conduct lays him open to the remark that nothing would have been heard of him had the joint adventure ended in loss instead of gain; and a court will not aid those who can be shown to have remained quiet in the hope of being able to evade responsibility in case of loss, but of being able to claim a share of gain in case of ultimate success.<sup>92</sup>

*Laches Where Partnership is a Mining Partnership*

The doctrine now under discussion is especially applicable to mining and other partnerships of a highly speculative character. Mining operations are so extremely doubtful as to their ultimate success that it is of the highest importance that those engaged in them should know on whom they can confidently rely for aid. If, therefore, a person engages in a mining adventure in partnership with others, and disputes arise between them, and he is denied a partner's rights, he should be careful to assert his claims whilst the dispute is fresh; for if he lies by until the mine has been rendered prosperous by his copartners, and he then comes forward, insisting on his rights as a partner, and seeks equitable, as distinguished from legal, relief, he will be refused it, on the ground that he has applied for it too late.<sup>93</sup>

<sup>91</sup> Thornton v. Proctor, 1 Anst. 94. See "Partnership," Dec. Dig. (Key No.) §§ 311, 321; Cent. Dig. §§ 722, 745.

<sup>92</sup> Cowell v. Watts, 2 Hall & T. 224. See "Partnership," Dec. Dig. (Key No.) § 114; Cent. Dig. § 177.

<sup>93</sup> Alloway v. Braine, 28 Beav. 575; Walker v. Jeffreys, 1 Hare, 341; Prendergast v. Turton, 1 Y. & C. Ch. 98; Clegg v. Edmondson, 8 De Gex, M. & G. 787; Rule v. Jewell, 18 Ch. Div. 660. See "Mining and Minerals," Dec. Dig. (Key No.) § 99; Cent. Dig. § 223.

## ACCOUNTING AND DISSOLUTION

### 166. Equity has jurisdiction of an action for the dissolution of a partnership and an accounting.

#### *Dissolution*

The remedy of a partner who insists upon a dissolution, which is opposed by his copartners, is by a suit in equity for a dissolution and an accounting.<sup>94</sup> An injunction and a receiver to restrain the defendants from dealing with the partnership assets, and from issuing bills or notes in the name of the firm, may be sought and granted in the same action. The action lies, although the partnership be a partnership at will, and can therefore be dissolved by the plaintiff himself;<sup>95</sup> and, if the partnership has been dissolved before the action is brought, the plaintiff is entitled to a declaration to that effect.<sup>96</sup> If the partnership is admitted, and the right to dissolve is not contested, the court will decree a dissolution on motion, before the hearing or trial.<sup>97</sup> An action may be brought for the rescission of a contract of partnership, or in the alternative, for dissolution of the

<sup>94</sup> Lindl. Partn. 492. Equity has jurisdiction to settle up the affairs of the partnership, and make whatever orders are necessary to do complete justice. Story, Partn. § 222; *Denver v. Roane*, 99 U. S. 355, 25 L. Ed. 476; *Ambler v. Whipple*, 20 Wall. 546, 22 L. Ed. 403; *Claggett v. Kilbourne*, 1 Black, 346, 17 L. Ed. 213; *Sharp v. Hibbins*, 42 N. J. Eq. 543, 9 Atl. 113; *Harvey v. Varney*, 98 Mass. 118; *Miller v. Lord*, 11 Pick. (Mass.) 11; *BRACKEN v. KENNEDY*, 4 Ill. 558, *Gilmore, Cas. Partnership*, 470; *Clark v. Gridley*, 41 Cal. 119; *Daniel v. Gillespie*, 65 W. Va. 366, 64 S. E. 254; *Whitmore v. William Waters Estate*, 142 Ill. App. 288. See "*Partnership*," *Dec. Dig. (Key No.)* §§ 313, 315, 319; *Cent. Dig.* §§ 729, 729½, 731, 739.

<sup>95</sup> Lindl. Partn. p. 491; *Master v. Kirton*, 3 Ves. 74. Where, however, the partnership is at will and has no assets, one partner has no right to demand an accounting of profits earned by his copartners, who continue the business after notifying him of their election to dissolve. *Brady v. Powers*, 112 App. Div. 845, 98 N. Y. Supp. 237. See "*Partnership*," *Dec. Dig. (Key No.)* §§ 324, 325; *Cent. Dig.* §§ 755-767.

<sup>96</sup> Lindl. Partn. p. 492.

<sup>97</sup> *Thorpe v. Holdsworth*, 3 Ch. Div. 637. See "*Partnership*," *Dec. Dig. (Key No.)* § 330; *Cent. Dig.* § 787.

partnership."<sup>22</sup> The grounds on which the court will dissolve a partnership will be considered hereafter in the chapter on "Termination of a Partnership."<sup>23</sup> In the present chapter it is proposed to consider the subjects of account, injunctions, and receivers.

### *Accounting*

One of the most ancient common-law actions was the action of account. It could, however, be brought only in a limited class of cases. The proceeding under it was cumbersome in the extreme, and courts of common law could not compel a discovery from the parties, who were incompetent to testify. It is not surprising, therefore, that the common-law action of account should have fallen into disuse. It was to some extent supplanted at law by the action of assumpsit. The equitable procedure, however, was greatly superior to that of the common-law tribunals, whatever form of action might be adopted. A master in chancery had abundant power to examine the parties on oath, to make inquiries from all proper persons by testimony on oath, and to require the production of all necessary documents.<sup>1</sup> Equity has plenary jurisdiction in the matter of a partnership accounting. It extends to all matters necessary to wind up the partnership affairs, including the sale of real estate.<sup>2</sup>

<sup>22</sup> Bagot v. Easton, 7 Ch. Div. 1. See "Partnership," Dec. Dig. (Key No.) § 327; Cent. Dig. § 771.

<sup>23</sup> Post, chapter X, §§ 200-203, pp. 585-591.

<sup>1</sup> Fetter, Eq. p. 248.

<sup>2</sup> Bates, Partn. 907; Bruns v. Helse, 101 Md. 163, 60 Atl. 604; Denver v. Roane, 99 U. S. 355, 25 L. Ed. 476; Clark v. Gridley, 41 Cal. 119; BRACKEN v. KENNEDY, 3 Scam. (Ill.) 558, Gilmore, Cas. Partnership, 470; Gillett v. Hall, 13 Conn. 426; Niles v. Williams, 24 Conn. 279; Bennett v. Woolfolk, 15 Ga. 213. As to the common-law action account, see Lee v. Abrams, 12 Ill. 111; BRACKEN v. KENNEDY, 3 Scam. (Ill.) 558, Gilmore, Cas. Partnership, 470; Hunt v. Gorden, 52 Miss. 195; Stuart v. Kerr, Morris (Iowa) 240; Neal v. Keel's Ex'rs, 4 T. B. Mon. (Ky.) 162; Wilhelm v. Caylor, 32 Md. 151; Appleby v. Brown, 24 N. Y. 143; Rickey v. Bowne, 18 Johns. (N. Y.) 131; Griffith v. Willing, 3 Bin. (Pa.) 317; Spear v. Newell, 2 Paine, 267, Fed. Cas. No. 13,224. Generally as to partnership accounting, see Lillendahl v. Stegmair, 45 N. J. Eq. 648, 18 Atl. 216; Niles v. Williams, 24 Conn. 279; Gillett v. Hall,

### SAME—RIGHT TO ACCOUNTING

167. Every partner is entitled to an account from his co-partners.<sup>3</sup>

168. ACCOUNTING UPON DISSOLUTION—A partner may maintain a bill for an accounting where there has either been a dissolution, or he has grounds to seek one.

It has been seen that the rule of equity not to interfere in partnership affairs except with a view to a dissolution has been relaxed. The application of this rule to actions for an accounting will be presently examined, but in cases where there has been a dissolution, or where grounds for a dissolution exist, and one is sought by the bill, the right of a partner to maintain the bill is undoubted.<sup>4</sup>

13 Conn. 428; *Cox v. Volkert*, 86 Mo. 505. The fact that the prayer of the complaint, in a suit to dissolve a partnership, asked damages, as well as an accounting and a receiver, does not make the action one at law. *Adams v. Shewalter*, 139 Ind. 178, 38 N. E. 607. In an action for an accounting between partners on a dissolution, the court will be governed, so far as it is reasonable, by the articles of agreement between the parties. *Leighton v. Clarke*, 42 Neb. 427, 60 N. W. 875. In a suit for the dissolution and settlement of a partnership, a personal judgment should not be rendered against one partner for the amount supposed to be due to the other as his share of the profits until the assets are reduced to cash and the debts paid, there being no agreement to the contrary. *Green v. Stacy*, 90 Wis. 46, 62 N. W. 627. See "*Partnership*," *Dec. Dig.* (Key No.) §§ 313, 319; *Cent. Dig.* §§ 729, 729½, 739.

<sup>3</sup> See, further, on the right to accounting, chapter VI, § 135, p. 392.

<sup>4</sup> *Eddy v. Fogg*, 192 Mass. 543, 78 N. E. 549; *Reis v. Reis*, 99 Minn. 446, 109 N. W. 997. See, also, cases in notes to section 133, p. 384, chapter VI.

Persons claiming under a partner may sometimes maintain an action for an accounting:

Thus personal representatives of a deceased partner may do so. *Hackwell v. Eustman*, Cro. Jac. 4101; *Heyne v. Middlemore*, 1 Rep. Ch. 138; *Rines v. Ferrell*, 107 Minn. 251, 119 N. W. 1055; *Miller v. Jones*, 39 Ill. 54; *Jennings' Adm'rs v. Chandler*, 10 Wis. 21; *Freeman v. Freeman*, 136 Mass. 260; *Grim's Appeal*, 105 Pa. 375; *Costley v. Towles*, 46 Ala. 660; *Denver v. Roane*, 99 U. S. 355, 25 L. Ed.

The right of every partner to have an account from his copartners of their dealings and transactions is too obvious

476. Cf. *Griffith v. Vanheythuysen*, 9 Hare, 85; *Hutton v. Laws*, 55 Iowa, 710, 8 N. W. 642; *State v. Brower*, 98 N. C. 344; *Newell v. Humphrey*, 37 Vt. 265.

Widows and heirs cannot, their remedy being to compel the representative to act or account. *Hutton v. Laws*, 55 Iowa, 710, 8 N. W. 642; *Harrison v. Righter*, 11 N. J. Eq. 389; *Tate v. Tate*, 35 Ark. 289; *Rosenzweig v. Thompson*, 66 Md. 593, 8 Atl. 659; *Ludlow's Heirs v. Cooper's Devisees*, 4 Ohio St. 1. For exceptions to this doctrine, see *Bates, Partn.* § 925.

The assignee of a partner's interest may maintain the bill. *Day v. Stafford*, 128 Mo. App. 438, 107 S. W. 433; *McPherson v. Swift*, 22 S. D. 165, 116 N. W. 76, 133 Am. St. Rep. 907; *Doll v. Hennessy Mercantile Mfg. Co.*, 33 Mont. 80, 81 Pac. 625; *Jones v. Way*, 78 Kan. 535, 97 Pac. 437, 18 L. R. A. (N. S.) 1180; *Strong v. Clawson*, 10 Ill. 346; *Miller v. Brigham*, 50 Cal. 615; *Donaldson v. President, etc., of State Bank*, 16 N. C. 103, 18 Am. Dec. 577; *Farley v. Moog*, 79 Ala. 148, 58 Am. Rep. 585; *Fourth Nat. Bank of New York v. New Orleans & O. R. Co.*, 11 Wall. 624, 20 L. Ed. 82; *Mathewson v. Clarke*, 6 How. 122, 12 L. Ed. 370. See, generally, *Bates, Part.* § 927.

A purchaser of a partner's share on execution is entitled to an account from the solvent partners, as is also the execution debtor himself. *Lindl. Partn.* p. 493; *HABERSHON v. BLURTON*, 1 De Gex & S. 121; *Perens v. Johnson*, 3 Smale & G. 419; *DUTTON v. MORRISON*, 17 Ves. 193, 196; *Newhall v. Buckingham*, 14 Ill. 405; *Farley v. Moog*, 79 Ala. 148, 58 Am. Rep. 585; *Hubbard v. Curtis*, 8 Iowa, 1, 74 Am. Dec. 283; *Barrett v. McKenzie*, 24 Minn. 20; *Clement v. Foster*, 38 N. C. 213; *Knerr v. Hoffman*, 65 Pa. 126; *Milleman v. Kavanaugh*, 213 Pa. 240, 62 Atl. 907. See, also, chapter VII, § 140, note 44, p. 418.

A creditor at large of the firm has no right to an accounting. *Clement v. Foster*, 38 N. C. 213; *Greenwood v. Brodhead*, 8 Barb. (N. Y.) 593; *Young v. Frier*, 9 N. J. Eq. 465; *Mittnacht v. Smith*, 17 N. J. Eq. 259, 88 Am. Dec. 233; *Freeman v. Stewart*, 41 Miss. 133; *Reese v. Bradford*, 13 Ala. 837.

Some courts have held surviving partners as trustees, and allowed the creditor to maintain a bill to wind up the partnership, and the same reasoning has been applied in cases of insolvency. *Bates, Partn.* § 929, cases cited. See, also, *Davis v. Grove*, 2 Rob. (N. Y.) 134, 635; *Sanderson v. Stockdale*, 11 Md. 563; *Bardwell v. Perry*, 19 Vt. 292, 302, 303, 47 Am. Dec. 687; *Fiske v. Gould* (C. C.) 12 Fed. 372; *Johnston v. Straus* (C. C.) 26 Fed. 57; *Fitzpatrick v. Flannagan*, 106 U. S. 648, 656, 1 Sup. Ct. 369, 27 L. Ed. 211.

Creditors of deceased partner, like the widow and heirs, must

to require comment. An action for an account may be maintained by partners, although the partnership accounts

enforce their rights through a personal representative. *Lindl. Part.* p. 494.

A subpartner has no right to an accounting from the principal firm, or any of the members of it, except the one with whom he is a subpartner, for there is no contract or privity except between those two. *Lindl. Partn.* p. 493; *BURNETT v. SNYDER*, 76 N. Y. 344, *Gilmore, Cas. Partnership*, 117, *Id.*, 81 N. Y. 550, 37 *Am. Rep.* 527; *Shearer v. Paine*, 12 *Allen (Mass.)* 289; *Reilly v. Reilly*, 14 *Mo. App.* 62; *Bates, Partn.* §§ 163, 923.

An employé, compensated by a share of the profits, may maintain a bill for an accounting. *Bentley v. Harris*, 10 *R. I.* 434, 14 *Am. Rep.* 695; *Hallett v. Cumston*, 110 *Mass.* 32; *Channon v. Stewart*, 103 *Ill.* 541; *Harrington v. Churchward*, 6 *Jur. (N. S.)* 576; *Rich-ton v. Grissell*, 5 *Eq. Cas.* 326; *Lindl. Partn.* p. 493. See, generally, *Freeman v. Freeman*, 136 *Mass.* 260; *Gerard v. Bates*, 124 *Ill.* 150, 16 *N. E.* 258, 7 *Am. St. Rep.* 350.

The fact that defendant in an action for an accounting denied his partnership with complainants did not deprive him of the right to a just statement of the account, on his being found to be a partner. *Thompson v. Noble*, 108 *Mich.* 19, 65 *N. W.* 563. Where, after dissolution of a partnership, all the assets are left in the hands of one partner to settle the partnership affairs, the copartner is entitled to an accounting, although the evidence shows the defendant has paid out more in satisfaction of firm debts than he has received from the assets. *Sharp v. Hibbins*, 42 *N. J. Eq.* 543, 9 *Atl.* 113. Where an employé of a firm receives a portion of the net profits of a branch of the business as part compensation for his services, equity will have jurisdiction of a bill by his employé for an account of the partnership affairs for the purpose of ascertaining the profits of such business, although the complainant is not a partner. *Chan-non v. Stewart*, 103 *Ill.* 541. See, also, *Hargrave v. Conroy*, 19 *N. J. Eq.* 281; *Hallett v. Cumston*, 110 *Mass.* 32; *Clark v. Gridley*, 41 *Cal.* 119.

The statute of limitations applies to actions of account between partners. The statute does not begin to run against each item of an account between partners from the time it becomes a part of the account; but, if part be within six years, it draws that which is before after it. *Todd v. Rafferty's Adm'rs*, 30 *N. J. Eq.* 254. A cause of action for an accounting of the affairs of a partnership does not necessarily accrue, for the purpose of setting the statute of limitations in motion, at the exact date of the dissolution of the partnership, by death or otherwise; but a court of equity may postpone the period, if the survivor, of necessity or by consent, continues in control of the property until the purpose of such control

are not complicated,<sup>5</sup> and although an action for damages may be sustainable,<sup>6</sup> and although the defendant may have stolen or embezzled the money of the firm.<sup>7</sup> Moreover, although formerly the court of chancery would not entertain a suit for damages merely, although the suit was in form a suit for an account,<sup>8</sup> yet, in a partnership suit involving a general account, claims were adjusted which in ordinary cases would have formed the subject of an action at law;<sup>9</sup> and it is apprehended that now the court will, in taking such an account, deal with every claim which it may be necessary to investigate in order to adjust and finally settle the

is accomplished, or the survivor has openly asserted an adverse claim. *Thomas v. Hurst* (C. C.) 73 Fed. 372; *McPherson v. Swift*, 22 S. D. 165, 116 N. W. 76, 133 Am. St. Rep. 907. Where a copartnership has ceased to do business more than six years, the right to have an account and settlement is barred by limitations. *Stovall v. Clay*, 108 Ala. 105, 20 South. 387.

An accounting may be had of the affairs of an illegal partnership, where it is completed. *Brooks v. Martin*, 2 Wall. 70, 17 L. Ed. 732; *Harvey v. Varney*, 98 Mass. 118; *Pfeuffer v. Maltby*, 54 Tex. 454, 38 Am. Rep. 631.

The complaint in an action for an accounting need not specify the particular transactions as to which the accounting will be required. *Teschmacher v. Lenz*, 82 Hun, 594, 31 N. Y. Supp. 543. On a bill for an accounting between partners, the burden of proof is on plaintiff to establish the partnership, and to show by the accounts that a true balance can be stated. *Hinkson v. Ervin*, 40 W. Va. 111, 20 S. E. 849. See "*Partnership*," *Dec. Dig. (Key No.)* §§ 297-348; *Cent. Dig.* §§ 679-822.

<sup>5</sup> *Cruikshank v. McVicar*, 8 Beav. 106. See "*Partnership*," *Dec. Dig. (Key No.)* §§ 298, 315; *Cent. Dig.* §§ 680-686, 731.

<sup>6</sup> *Wright v. Hunter*, 5 Ves. 792; *Blain v. Agar*, 1 Sim. 37; *Id.*, 2 Sim. 289; *Townsend v. Ash*, 3 Atk. 330. See "*Partnership*," *Dec. Dig. (Key No.)* §§ 315, 317; *Cent. Dig.* §§ 731, 733.

<sup>7</sup> *Roope v. D'Avigdor*, 10 Q. B. Div. 412. See "*Partnership*," *Dec. Dig. (Key No.)* §§ 315, 317.

<sup>8</sup> *Duncan v. Luntley*, 2 Macn. & G. 30. See, also, *Clifford v. Brooke*, 13 Ves. 132; *Tannenbaum v. Armeny*, 81 Hun, 581, 31 N. Y. Supp. 55. See "*Partnership*," *Dec. Dig. (Key No.)* § 315; *Cent. Dig.* § 731.

<sup>9</sup> *Bury v. Allen*, 1 Colly. Ch. 589; *MacKenna v. Parkes*, 36 Law J. Ch. 366, 15 Wkly. Rep. 217. Cf. *Great Western Ins. Co. v. Cunniffe*, 9 Ch. App. 525. See "*Partnership*," *Dec. Dig. (Key No.)* §§ 313-317, 344; *Cent. Dig.* §§ 729-733, 813-816.

account. Disputes not affecting the accounts will naturally be excluded from it.<sup>10</sup>

### *Costs on Accounting*

While each particular case will be considered according to its own facts, as a general rule the costs involved in a partnership accounting are paid out of the partnership funds.<sup>11</sup> The court, however, has full power to apportion the costs among the partners, or tax them against one partner only. Where there are no partnership funds for distribution, the costs will usually be divided between the parties.<sup>12</sup> Where one partner has been guilty of misconduct, and has compelled a resort to litigation, he may be personally charged with the payment of costs.<sup>13</sup> In case the costs are charged against the firm assets, they will, if those assets are sufficient, be paid before profits are divided.<sup>14</sup> Claims for costs, however, are usually postponed to claims for advances and for capital.<sup>15</sup>

<sup>10</sup> Lindl. Partn. p. 493. In an action for an accounting, it is error to give plaintiff judgment against defendants jointly for the full amount of his claim, without adjudging the respective liabilities of defendants. *Gimpel v. Wilson*, 10 Misc. Rep. 153, 30 N. Y. Supp. 942. See "Partnership," Dec. Dig. (Key No.) § 344; Cent. Dig. §§ 815-816.

<sup>11</sup> *Gilman v. Vaughan*, 44 Wis. 646; *GYGER'S APPEAL*, 62 Pa. 73, 1 Am. Rep. 382. See "Partnership," Dec. Dig. (Key No.) § 346; Cent. Dig. § 820.

<sup>12</sup> *GROTH v. KERSTING*, 23 Colo. 213, 47 Pac. 393, *Gilmore, Cas. Partnership*, 484; *FOLSOM v. MARLETTE*, 23 Nev. 459, 49 Pac. 39, *Gilmore, Cas. Partnership*, 486. See "Partnership," Dec. Dig. (Key No.) § 346; Cent. Dig. § 820.

<sup>13</sup> *TAFT v. SCHWAMB*, 80 Ill. 289; *Knapp v. Edwards*, 57 Wis. 191, 15 N. W. 140; *Hamer v. Giles*, 11 Ch. D. 942; *O'Lone v. O'Lone*, 2 Grant's Ch. 125. See "Partnership," Dec. Dig. (Key No.) § 346; Cent. Dig. § 820.

<sup>14</sup> *MATTINGLY v. STONE'S ADM'R*, 35 S. W. 921, 18 Ky. Law Rep. 187. See "Partnership," Dec. Dig. (Key No.) § 346; Cent. Dig. § 820.

<sup>15</sup> *POTTER v. JACKSON*, 13 Ch. D. 845; *ROSS v. WHITE* (1894) 3 Ch. 326. In the last case a partner indebted to the firm was required to pay such indebtedness before being entitled to have the costs paid out of the firm assets. See "Partnership," Dec. Dig. (Key No.) § 346; Cent. Dig. § 820.

**169. ACCOUNTING WITHOUT DISSOLUTION—A**

partner may sometimes maintain a bill for an accounting without a dissolution. The following are the principal classes of cases in which an accounting without a dissolution will be granted:

- (a) Where one partner has sought to withhold from his copartner the profit arising from some secret transaction (p. 506).
- (b) Where the partnership is for a term of years still unexpired, and one partner has sought to exclude or expel his copartner, or drive him to a dissolution (pp. 507, 508).
- (c) Where the partnership has proved a failure, and the partners are too numerous to be made parties to the action, and a limited account will result in justice to them all (p. 508).
- (d) Where there is an agreement for periodical accountings or accountings as to distinct transactions (p. 509).
- (e) Where an execution or attachment has been levied against one partner's interest (p. 509).

*General or Limited Account*

The account which a partner may seek to have taken may be either a general account of the dealings and transactions of the firm, with a view to a winding up of the partnership, or a more limited account, directed to some particular transaction as to which a dispute has arisen. It was formerly considered that no account between partners could be taken in equity, save with a view to a dissolution;<sup>16</sup>

<sup>16</sup> Lindl. Partn. p. 495; *Forman v. Homfray*, 2 Ves. & B. 329; *Loscombe v. Russell*, 4 Sim. 8; *Knebell v. White*, 2 Younge & C. Exch. 15. See, also, *Glynn v. Phetteplace*, 26 Mich. 383; *Phillips v. Blatchford*, 137 Mass. 510; *Davis v. Davis*, 60 Miss. 615; *Coville v. Gilman*, 13 W. Va. 819; *Clark v. Gridley*, 41 Cal. 119.

"The general rule is that a court of equity, in a suit by one partner against another, will not interfere in matters of internal regulation, or except with a view to dissolve the partnership, and by a final decree to adjust all its affairs. Story on Partnership, § 229; Lindley, 567; Gow. 114; Parsons, § 206; Bates, § 910; Collier, § 236. It is not its office 'to enter into a consideration of mere part-

and a bill praying an account, but not a dissolution, has been held bad on demurrer.<sup>17</sup> But this rule has been considerably relaxed, for it has been felt that more injustice frequently arose from the refusal of the court to do less than

nership squabbles' (*Wray v. Hutchison*, 2 Mylne & Keen, 235, 238), or 'on every occasion to take the management of every playhouse and brewhouse' (*Carlin v. Drury*, Vesey & B. 153, 158). If the members of the firm cannot agree as to the method of conducting their business, the courts will not attempt to conduct it for them. Aside from the inconvenience of constant interference, as litigation is apt to breed hard feelings, easy appeals to the courts to settle the differences of a going concern would tend to do away with mutual forbearance, foment discord, and lead to dissolution. It is to the interest of the law of partnership that frequent resort to the courts by copartners should not be encouraged, and they should realize that, as a rule, they must settle their own differences, or go out of business. As a learned writer has said: 'A partner, who is driven to a court of equity as the only means by which he can get an accounting from his copartners, may be supposed to be in a position which will be benefited by a dissolution; in other words, such a partnership as that ought to be dissolved.' *Parsons on Partnership* (4th Ed.) § 206. 'If a continuance of the partnership is contemplated,' as another commentator has said, 'or if an accounting of only part of the partnership concerns is allowed, no complete justice can be done between the partners, and the fluctuations of a continuing business will render the accounting which is correct to-day incorrect to-morrow; and to entertain such bills on behalf of a partner would involve the court in incessant litigation, foment disputes, and needlessly drag partners not in fault before the public tribunals.' 2 *Bates on Partnership*, § 910. Judge Story declared that 'a mere fugitive temporary breach, involving no serious evils or mischief, and not endangering the future success and operations of the partnership, will therefore not constitute any case for equitable relief. \* \* \* It is very certain that, pending the partnership, courts of equity will not interfere to settle accounts and set right the balance between the partners, but await the regular winding up of the concern.' *Story on Partnership*, §§ 225, 229. While a forced accounting without a dissolution is not impossible, it is by no means a matter of course, for facts must be alleged and proved showing that it is essential to the continuance of the business, or that some special and unusual reason exists to make it necessary. Thus Mr. Lindley, upon whom reliance was placed by the courts below, mentions three classes of cases as exceptions to the general rule: (1) Where one partner has sought to withhold from his co-

<sup>17</sup> *Loscombe v. Russell*, 4 Sim. 8. See "*Partnership*," *Dec. Dig.* (Key No.) § 327; *Cent. Dig.* § 771.

complete justice than could have arisen from interfering to no greater extent than was desired by the suitor aggrieved.<sup>18</sup> Where, however, no good reason appears for departing from the old rule, it will be adhered to.<sup>19</sup> Certain exceptions to the rule have become established, and these will be more briefly considered.

*Account Where One Partner Withholds What the Firm is Entitled to*

Where one partner has obtained a secret benefit, which, upon principles already discussed, all the partners are entitled to, but from which he seeks to exclude his copartners, they can obtain their share of such benefit by an action for an account, and such action is sustainable, although no dissolution is sought.<sup>20</sup> The equity of the firm, however, is against the delinquent partner only, and where the benefit which the plaintiffs assert their right to share has not yet been obtained, but only agreed for by their copartner, the plaintiffs have no locus standi against a person with whom the agreement has been entered into by such partner, and

partner the profits arising from some secret transaction; (2) where the partnership is for a term of years still unexpired, and one partner has sought to exclude or expel his copartner, or drive him to a dissolution; (3) where the partnership has proved a failure, and the partners are too numerous to be made parties to the action, and a limited account will result in justice to them all.' Per Vann, J., in *LORD v. HULL*, 178 N. Y. 9, 70 N. E. 69, 102 Am. St. Rep. 484, Gilmore, Cas. Partnership, 474. See "*Partnership*," *Dec. Dig. (Key No.)* §§ 313-348; *Cent. Dig.* §§ 729-822.

<sup>18</sup> See ante, p. 409; *Prole v. Masterman*, 21 Beav. 61. *Of. Munnings v. Bury*, Tam. 147; *Bromley v. Williams*, 32 Beav. 177; *Hutchinson v. Wright*, 25 Beav. 444; *Taylor v. Dean*, 22 Beav. 429. See "*Partnership*," *Dec. Dig. (Key No.)* §§ 313-348; *Cent. Dig.* §§ 729-822.

<sup>19</sup> *Ambler v. Whipple*, 20 Wall. 546, 22 L. Ed. 403; *Patterson v. Ware*, 10 Ala. 444; *Fairchild v. Valentine*, 7 Rob. (N. Y.) 564. See "*Partnership*," *Dec. Dig. (Key No.)* §§ 313-348; *Cent. Dig.* §§ 729-822.

<sup>20</sup> *Lindl. Partn.* 495. See, also, *Hichens v. Congreve*, 1 Russ. & M. 150; *Fawcett v. Whitehouse*, Id. 132; *Beck v. Kantorowicz*, 3 Kay & J. 230; *Society for Illustration of Practical Knowledge v. Abbott*, 2 Beav. 559; *Davis v. Davis*, 60 Miss. 615; *Traphagen v. Burt*, 67 N. Y. 30. See "*Partnership*," *Dec. Dig. (Key No.)* §§ 313, 315; *Cent. Dig.* §§ 729, 731.

cannot therefore restrain such persons from performing that agreement. The proper course for the aggrieved partners to take is to proceed against their copartner, and claim from him the benefit of the agreement into which he has entered.<sup>21</sup>

*Account in Cases of Exclusion*

Where the partnership is for a term of years still unexpired, and one partner has sought to exclude or expel his copartner, or to drive him to dissolution, an account has been directed, although no dissolution has been asked.<sup>22</sup> The general proposition that courts of equity would interfere under the circumstances now supposed was laid down in *Harrison v. Armitage*,<sup>23</sup> where, however, no account was directed, inasmuch as the evidence did not establish a partnership. But in *Chapple v. Cadell*<sup>24</sup> an account was directed at the suit of a minority, where the majority had sold a partnership newspaper to a stranger, and some of the more active of the majority had then entered into a fresh agreement with the purchaser to carry on the paper in partnership with him. *Richards v. Davies*<sup>25</sup> went a step further. There a partnership had been entered into for a term of years, which was still unexpired. The defendant would come to no account with the plaintiff respecting the partnership dealings and transactions, but, on the application

<sup>21</sup> *Lindl. Partn.* 496; *Alder v. Fouracre*, 3 Swanst. Ch. 489. Where defendant transferred certain partnership property to a third person, his copartner is not obliged to rely on an action for damages, but may sue for an accounting, and compel a surrender of his share of the proceeds of such sale. *Tannenbaum v. Armeny*, 81 Hun, 581, 31 N. Y. Supp. 55. See "*Partnership*," *Dec. Dig. (Key No.)* §§ 313-318; *Cent. Dig.* §§ 729-738.

<sup>22</sup> *Hogan v. Walsh*, 122 Ga. 283, 50 S. E. 84; *Davis v. Davis*, 60 Miss. 615; *Traphagen v. Burt*, 67 N. Y. 30; *Knowles v. Haughton*, 11 Ves. 168; *Harrison v. Armitage*, 4 Madd. 143; *Blisset v. Daniel*, 10 Hare, 493. See "*Partnership*," *Dec. Dig. (Key No.)* §§ 313-318; *Cent. Dig.* §§ 729-738.

<sup>23</sup> 4 Madd. 143. See "*Partnership*," *Dec. Dig. (Key No.)* §§ 313-318; *Cent. Dig.* §§ 729-738.

<sup>24</sup> *Jac.* 537. See "*Partnership*," *Dec. Dig. (Key No.)* §§ 313-318; *Cent. Dig.* §§ 729-738.

<sup>25</sup> 2 Russ. & M. 347. See "*Partnership*," *Dec. Dig. (Key No.)* §§ 313-318; *Cent. Dig.* §§ 729-738.

of the plaintiff, a decree for an account of all past transactions was made.<sup>26</sup>

*Defendant Seeking to Drive Plaintiff to Dissolve*

It has also been held that, where defendant conducted himself in such a way as to prevent the possibility of the partnership business being carried on, an accounting without dissolution may be had.<sup>27</sup> If such relief were not available, a person fraudulently inclined might, of his mere will and pleasure, compel his copartner to submit to the alternative of dissolving a partnership, or ruin him by a continued violation of the partnership contract.

Again, where a person seeks to establish a partnership with another who denies the plaintiff's title to be considered a partner, if the former is successful upon the main point in dispute, an account of the past dealings and transactions will be decreed, although the plaintiff does not seek for a dissolution of the partnership which he has proved to exist.<sup>28</sup> Upon the same principle, it is apprehended that if a partner is wrongfully expelled, and he is restored to his status as a partner by the judgment of the court, an account will be directed, but the partnership will not necessarily be dissolved.<sup>29</sup>

*Account Where Concern has Failed*

Where the partnership has proved a failure, and the partners are too numerous to be made parties to the action, and

<sup>26</sup> The objection has been made that to allow such an account the defendant might be vexed by a new bill whenever new profits accrued. This was urged by Lord Eldon in *Forman v. Homfray*, 2 Ves. & B. 330, by Vice Chancellor Shadwell in *Loscombe v. Russell*, 4 Sim. 8, and by Baron Alderson in *Knebell v. White*, 2 Younge & C. Exch. 15. The answer was made in *Richards v. Davis* that the defendant would have no right to complain if he repeated the injustice of withholding what was due to the plaintiff. See "*Partnership*," Dec. Dig. (Key No.) §§ 313-318; Cent. Dig. §§ 729-733.

<sup>27</sup> *Fairthorne v. Weston*, 3 Hare, 387. See "*Partnership*," Dec. Dig. (Key No.) §§ 272, 313-318; Cent. Dig. §§ 619, 729-733.

<sup>28</sup> *Knowles v. Haughton*, 11 Ves. 168, as reported in Colly. Partn. (6th Ed.) 431, note. See "*Partnership*," Dec. Dig. (Key No.) §§ 313-318; Cent. Dig. §§ 729-733.

<sup>29</sup> *Blisset v. Daniel*, 10 Hare, 403; Lindl. Partn. p. 498. See "*Partnership*," Dec. Dig. (Key No.) §§ 313-318; Cent. Dig. §§ 729-733.

a limited account will result in justice to them all, such an account will be directed, although a dissolution is not asked for.<sup>30</sup> This doctrine extends, not only to cases where an account is sought for the purpose of having joint assets applied in discharge of the joint liabilities, but also to cases where an account is sought for the additional purpose of obtaining a division of the surplus assets and profits among the persons entitled thereto.<sup>31</sup>

#### *Agreements for Periodical Accountings*

An agreement between partners for a periodical accounting, or for the settlement of distinct transactions as they occur, may be enforced without a dissolution.<sup>32</sup> Thus, in the case of a partnership to deal in lands, where it was agreed that the proceeds of each sale should be divided at the time made, it was held that a division of the proceeds could be compelled without ordering the sale of other lands.<sup>33</sup>

#### *Execution against One Partner's Interest*

Where the interest of a partner has been seized on execution or attachment by his individual creditor, a bill for an accounting to determine what, if any, interest such partner had, may be maintained without a dissolution. "Where the court is asked to order an account between partners, in order to determine whether, at the time of the attachment,

<sup>30</sup> Lindl. Partn. 498; Wallworth v. Holt, 4 Mylne & C. 619; Richardson v. Hastings, 7 Beav. 323; Id., 11 Beav. 17; Deeks v. Stanhope, 14 Sim. 57; Apperly v. Page, 1 Phil. Ch. 779; Wilson v. Stanhope, 2 Colly. 629; Cooper v. Webb, 15 Sim. 454; Clements v. Bowes, 17 Sim. 167; Sheppard v. Oxenford, 1 Kay & J. 491, 501. See "Partnership," Dec. Dig. (Key No.) §§ 267, 313-318; Cent. Dig. §§ 611, 729-738.

<sup>31</sup> Lindl. Partn. p. 500. See Coville v. Gilman, 13 W. Va. 314. See "Partnership," Dec. Dig. (Key No.) §§ 313-318; Cent. Dig. §§ 729-738.

<sup>32</sup> Miller v. Freeman, 111 Ga. 654, 36 S. E. 961, 51 L. R. A. 504; Wadley v. Jones, 55 Ga. 329; Attorney General v. State Bank, 1 Dev. & B. Eq. (N. C.) 545. See, also, Denver v. Roane, 99 U. S. 355, 25 L. Ed. 476. See "Partnership," Dec. Dig. (Key No.) §§ 313-318; Cent. Dig. §§ 729-738.

<sup>33</sup> Patterson v. Ware, 10 Ala. 444. See "Partnership," Dec. Dig. (Key No.) §§ 310-313, 344; Cent. Dig. §§ 729-738, 814.

the partner proceeded against at law by his creditor had any beneficial interest in the property attached, the same reason for refusal to proceed does not exist as in case of a suit between partners, where the object is to ascertain their relative rights, with a view to decreeing the payment of a balance by one to the other. The creditor attaches the interest of one partner as it exists at the time of the attachment. Subsequent changes in the relations of the partners inter sese, or in the rights of creditors, which are only substituted rights of the partners, are not necessary to be ascertained.”<sup>84</sup>

### SPECIFIC PERFORMANCE

170. Specific performance of an agreement for a partnership will not be decreed, except

EXCEPTION—(a) When the execution of an instrument or of articles of partnership are necessary to confer rights upon the other party, or to determine his status, it will be decreed whether the partnership was at will or for a fixed term, but the parties will not be compelled to act under the articles when signed.

(b) Persons may be decreed to be partners, for the purposes of an accounting, after the joint adventure has come to an end.

#### *General Rule Against Specific Performance of Agreements for Partnership*

If two persons have agreed to enter into partnership, and one of them refuses to abide by the agreement, the remedy for the other is an action for damages, and not, excepting in the cases to be presently noticed, for specific performance. To compel an unwilling person to become a partner with another would not be conducive to the welfare of the latter, any more than to compel a man to marry a woman

<sup>84</sup> *Cropper v. Coburn*, 2 Curt. 465, Fed. Cas. No. 3,416. See “Partnership,” *Deco. Dig.* (Key No.) §§ 209, 310-313; *Cent. Dig.* §§ 402, 729-738.

he did not like would be for the benefit of the woman. Moreover, to decree specific performance of an agreement for a partnership at will would be nugatory, inasmuch as it might be dissolved the moment after the decree was made; and to decree specific performance of an agreement for a partnership for a term of years would involve the court in the superintendence of the partnership throughout the whole continuance of the term. As a rule, therefore, courts will not decree specific performance of an agreement for a partnership.<sup>35</sup> Nor will specific performance be decreed of an agreement to become a partner and bring in a certain amount of capital, or, in default, to lend a sum of money to the plaintiff.<sup>36</sup>

*Cases in Which a Decree will be Made*

However, if the parties have agreed to execute some formal instrument, which would have the effect of conferring rights which do not exist so long as the agreement is not carried out, in such a case, and for the purpose of putting the parties into the position agreed upon, the execution of that formal instrument may be decreed, although the partnership thereby formed might be immediately dissolved.<sup>37</sup>

<sup>35</sup> *Scott v. Rayment*, L. R. 7 Eq. 112; *Hercy v. Birch*, 9 Ves. 357; *Sheffield Gas Consumers' Co. v. Harrison*, 17 Beav. 294; *Buxton v. Lister*, 3 Atk. 383; *England v. Curling*, 8 Beav. 129; *Syers v. Syers*, 1 App. Cas. 174; *BUCK v. SMITH*, 29 Mich. 166, 18 Am. Rep. 84, *Gilmore, Cas. Partnership*, 479; *Morris v. Peckham*, 51 Conn. 128. An agreement for a partnership for a fixed term will not be enforced. See *Somerby v. Buntin*, 118 Mass. 279, 19 Am. Rep. 459; *Meason v. Kaine*, 63 Pa. 335; *Stocker v. Wedderburn*, 3 Kay & J. 393. See "*Specific Performance*," *Dec. Dig. (Key No.)* § 79; *Cent. Dig.* § 189.

<sup>36</sup> *Sichel v. Mosenthal*, 30 Beav. 371. Where the contract is merely to contribute capital, an action for damages is an adequate remedy. See "*Specific Performance*," *Dec. Dig. (Key No.)* § 79; *Cent. Dig.* § 189.

<sup>37</sup> *Buxton v. Lister*, 3 Atk. 385; *Stocker v. Wedderburn*, 3 Kay & J. 403. And see *Crawshay v. Maule*, 1 Swanst. 513, note. Conveyances of property rights may be enforced. See *Story, Partn.* § 189; 1 *Story, Eq. Jur.* 666; *Somerby v. Buntin*, 118 Mass. 279, 19 Am. Rep. 459; *Birchett v. Bolling*, 5 Munf. (Va.) 442; *Satterthwait v. Marshall*, 4 Del. Ch. 337; *Robinson v. McIntosh*, 3 E. D. Smith (N. Y.) 221; *Tilman v. Cannon*, 3 Humph. (Tenn.) 637; *Beckwith v.*

*Specific Performance Where an Account Only is Wanted*

The only other class of cases in which anything like specific performance of an agreement for a partnership will be decreed is where a person who has agreed with another to share the profits of some joint adventure seeks to obtain that share after the adventure has come to an end. Although the decree giving him the relief he asks may be prefaced by a declaration that the agreement relied upon ought to be specifically performed, this has not the effect of creating a partnership to be carried on by the litigants, but merely serves as a foundation for the decree for an account.

Manton, 12 R. I. 442; Whitworth v. Harris, 40 Miss. 483. But see Sims v. McEwen's Adm'r, 27 Ala. 184.

In England v. Curling, 8 Beav. 129, the plaintiff and two of the defendants agreed to become partners as ship agents, for 7, 10, or 14 years, and they signed with their initials an agreement to that effect. A deed was prepared to carry out the agreement. The deed, however, was never executed, and it differed somewhat from the agreement. The parties carried on business as partners under the agreement for 11 years, and then they began to quarrel. The defendant Curling, who appears to have been in the wrong from the beginning, gave notice to dissolve in 3 months. He retired from the partnership, and entered into partnership with other persons, and carried on business with them on the premises and in the name of the old firm. The new firm opened the letters addressed to the old one, and gave notice of its dissolution to its correspondents. The plaintiff then filed a bill for specific performance and an injunction, and he obtained a decree. The following was the minute of the decree: "The court doth declare that the agreement for a copartnership, dated, etc., is a binding agreement between the parties thereto, and ought to be specifically performed and carried into execution, and doth order and decree the same accordingly. Refer it to the master to inquire whether any and what variations have been made in the said agreement by and with the assent of the several parties thereto since the date thereof. Let the master settle and approve of a proper deed of copartnership between the said parties in pursuance of the said agreement, having regard to any variations which he may find to have been made in the said agreement as hereinbefore directed; and let the parties execute it. Continue the injunction against the defendant Curling." It is to be noticed that the relief granted was by restraint, and not enforcement, except merely as to signing the deed. See the observations of Lord Romilly on this case in Sichel v. Mosenthal, 30 Beav. 376. See "*Specific Performance*," Dec. Dig. (Key No.) § 79; Cent. Dig. § 189.

which is the substantial part of what is sought and given. An instance of this class of cases is afforded by *Dale v. Hamilton*.<sup>38</sup> There, in substance, three persons had agreed to purchase land, to build on it and improve it, and then to sell it for their common benefit. Land was accordingly obtained, built upon, and improved, and subsequently the right of one of the three persons to any share in the adventure was denied by the other two. He thereupon filed a bill for a sale of the land, for an account of the joint speculation, and for a proper distribution of the moneys arising from the sale; and the court held him entitled to this relief.<sup>39</sup>

*Specific Performance for Other Purposes*

Relief in the shape of specific performance may be required for other purposes besides carrying into execution agreements to form partnerships. The assistance of a court is often requisite to compel those engaged in a going concern to act conformably to the articles of partnership, and also to compel those who have dissolved partnership to observe the stipulations into which they have entered. The relief will be granted or refused upon the principles by which the court is ordinarily guided in questions of specific performance, and that nothing turns on the circumstance of the litigants having been partners. For purposes of reference, it may be useful to mention that the court has enforced the following agreements, entered into upon or with a view to a dissolution, namely, agreements not to carry on business within a certain distance or for a certain space of time;<sup>40</sup> agreements as to the custody of partnership books, and the furnishing of copies thereof;<sup>41</sup> agreements that a

<sup>38</sup> 5 Hare, 369, and 2 Phil. Ch. 286. See "*Specific Performance*," *Dec. Dig. (Key No.)* § 79; *Cent. Dig.* § 189.

<sup>39</sup> For another instance, see *Webster v. Bray*, 7 Hare, 159. See "*Specific Performance*," *Dec. Dig. (Key No.)* § 79; *Cent. Dig.* § 189.

<sup>40</sup> *Whittaker v. Howe*, 3 Beav. 383; *Turner v. Major*, 3 Giff. 442. And see *Coates v. Coates*, 6 Madd. 287; *Williams v. Williams*, 1 Wils. Ch. 473, note. See "*Specific Performance*," *Dec. Dig. (Key No.)* § 79; *Cent. Dig.* § 189.

<sup>41</sup> *Lingen v. Simpson*, 1 Sim. & S. 600. And see *Whittaker v. Howe*, 3 Beav. 383. See "*Specific Performance*," *Dec. Dig. (Key No.)* § 79; *Cent. Dig.* § 189.

third party, and he only, shall get in debts;<sup>42</sup> agreements that the value of the share of an outgoing or a deceased partner shall be ascertained in a specified way, and taken accordingly;<sup>43</sup> agreements that an outgoing partner shall offer his share to his copartners before selling it to other persons;<sup>44</sup> agreements to grant an annuity to a retiring partner and his widow;<sup>45</sup> agreements not to divulge or make use of a trade secret.<sup>46</sup>

## INJUNCTION

171. The granting of an injunction to protect a partner's rights is governed by ordinary principles. It may be granted, although no dissolution of the partnership is sought.

### *Injunctions and Receivers*

In order to prevent a partner from acting contrary to the agreement into which he may have entered with his copartners, or contrary to the good faith which, independently of any agreement, is to be observed by one partner towards his copartner, it is sometimes necessary for a court to interfere, either by granting an injunction against the partner

<sup>42</sup> *Davis v. Amer*, 3 Drew. 64; *Turner v. Major*, 3 Giff. 442. See "Specific Performance," *Dec. Dig. (Key No.)* § 79; *Cent. Dig.* § 189.

<sup>43</sup> *Morris v. Kearsley*, 2 Younge & C. Exch. 130; *Essex v. Essex*, 20 Beav. 442; *King v. Chuck*, 17 Beav. 325. And see *Featherstonhaugh v. Turner*, 25 Beav. 382, and *Gibson v. Goldsmid*, 5 De Gex, M. & G. 757, reversing 18 Beav. 584. Cf. *Downs v. Collins*, 6 Hare, 418, where to have enforced the agreement would have been to decree specific performance of a contract for a partnership; and *Cooper v. Hood*, 7 Wkly. Rep. 83, where a decree was refused on the ground that the agreement sought to be enforced was too vague in its terms. See "Specific Performance," *Dec. Dig. (Key No.)* § 79; *Cent. Dig.* § 189.

<sup>44</sup> *Homfray v. Fothergill*, L. R. 1 Eq. 567. See "Specific Performance," *Dec. Dig. (Key No.)* § 79; *Cent. Dig.* § 189.

<sup>45</sup> *Aubin v. Holt*, 2 Kay & J. 66; *Page v. Cox*, 10 Hare, 163. See "Specific Performance," *Dec. Dig. (Key No.)* § 79; *Cent. Dig.* § 189.

<sup>46</sup> *Morison v. Mont*, 9 Hare, 241. See "Specific Performance," *Dec. Dig. (Key No.)* § 79; *Cent. Dig.* § 189.

complained of, or by taking the affairs of the partnership out of the hands of all the partners, and intrusting them to a receiver of its own appointment. These two modes of interference require to be considered separately, for they are not had recourse to indiscriminately. The appointment of a receiver, it is true, always operates as an injunction, for the court will not suffer its officer to be interfered with by any one;<sup>47</sup> but it by no means follows that, because the court will not take the affairs of a partnership into its own hands, it will not restrain some one or more of the partners from doing what may be complained of.<sup>48</sup>

### Illustrations

Partners may be enjoined from excluding their copartner from the partnership business;<sup>49</sup> from using partnership property contrary to the partnership agreement;<sup>50</sup> from changing the fundamental nature of the partnership busi-

<sup>47</sup> *Helmore v. Smith*, 35 Ch. Div. 449; *Lindl. Partn.* p. 538. See "*Partnership*," *Dec. Dig. (Key No.)* §§ 118, 119, 209, 210, 324, 325; *Cent. Dig.* §§ 181, 181½, 401-403, 755-767.

<sup>48</sup> See *Hall v. Hall*, 3 Macn. & G. 79, 85; *Rutland Marble Co. v. Ripley*, 10 Wall. 339, 19 L. Ed. 955; *PIRTLE v. PENN.*, 3 Dana (Ky.) 247, 28 Am. Dec. 70, *Gilmore, Cas. Partnership*, 480; *Van Kuren v. Trenton Locomotive & Machine Mfg. Co.*, 13 N. J. Eq. 303; *New v. Wright*, 44 Miss. 202; *Wilson v. Fitcher*, 11 N. J. Eq. 71; *Ballou v. Wood*, 8 Cush. (Mass.) 48. An injunction will be granted to restrain one partner from using partnership property in a manner not authorized in the contract of partnership. *New v. Wright*, 44 Miss. 202. Generally, as to injunctions to protect rights after dissolution, see *Wilkinson v. Tilden* (C. C.) 9 Fed. 683; *Fletcher v. Vandusen*, 52 Iowa, 448, 3 N. W. 488; *SHANNON v. WRIGHT*, 60 Md. 520, *Gilmore, Cas. Partnership*, 481; *McGowan Bros. Pump & Mach. Co. v. McGowan*, 22 Ohio St. 370. See "*Partnership*," *Dec. Dig. (Key No.)* §§ 118, 209, 324; *Cent. Dig.* §§ 181, 401, 402, 755, 756.

<sup>49</sup> *Rutland Marble Co. v. Ripley*, 10 Wall. 339, 19 L. Ed. 955; *PIRTLE v. PENN.*, 3 Dana (Ky.) 247, 28 Am. Dec. 70, *Gilmore, Cas. Partnership*, 480; *Wolbert v. Harris*, 7 N. J. Eq. 605; *Hall v. Hall*, 12 Beav. 414; *Petit v. Cheveller*, 13 N. J. Eq. 181; *McCabe v. Sinclair*, 66 N. J. Eq. 24, 58 Atl. 412; *Fitzgerald v. Flynn* (R. I.) 69 Atl. 921; *Miller v. O'Boyle* (C. C.) 89 Fed. 140. See "*Partnership*," *Dec. Dig. (Key No.)* § 118; *Cent. Dig.* § 181.

<sup>50</sup> *New v. Wright*, 44 Miss. 202; *Hall v. Hall*, 12 Beav. 414. See "*Partnership*," *Dec. Dig. (Key No.)* § 118; *Cent. Dig.* § 181.

ness;<sup>51</sup> from carrying on a competing business;<sup>52</sup> and injunctions have been granted in many other classes of cases.<sup>53</sup> Even where the partnership is at will, an injunction may be granted, but not, of course, where it would be valueless.<sup>54</sup> While the granting of an injunction usually accompanies an action for a dissolution, it may occur although no dissolution is sought.<sup>55</sup>

### *Injunction in Action for Dissolution*

In an action instituted for the purpose of having a partnership dissolved, or of having an account taken after a partnership has been dissolved, it has never been doubted that an injunction will be granted to restrain one of the partners from doing any act which will impede the winding up of the concern. For example, one partner will be restrained from carrying on the concern for any other purpose than winding up;<sup>56</sup> from damaging the value of the good will, if it ought to be sold for the benefit of all;<sup>57</sup>

<sup>51</sup> *Natusch v. Irving*, 2 Coop. t. Cott. 358. See "*Partnership*," Dec. Dig. (Key No.) § 118; Cent. Dig. § 181.

<sup>52</sup> *Marshall v. Johnson*, 33 Ga. 500; *Kemble v. Kean*, 6 Sim. 333, 335. See "*Partnership*," Dec. Dig. (Key No.) §§ 99, 118; Cent. Dig. §§ 153, 181.

<sup>53</sup> See *Glassington v. Thwaites*, 1 Sim. & S. 124; *Stockdale v. Ullery*, 37 Pa. 486, 78 Am. Dec. 440; *Morris v. Colman*, 18 Ves. 437; *Levine v. Michel*, 35 La. Ann. 1121; *England v. Curling*, 8 Beav. 129. See "*Partnership*," Dec. Dig. (Key No.) § 118; Cent. Dig. § 181.

<sup>54</sup> *Lindl. Partn.* p. 540. See *Peacock v. Peacock*, 16 Ves. 49; *Miles v. Thomas*, 9 Sim. 606. See "*Partnership*," Dec. Dig. (Key No.) § 118; Cent. Dig. § 181; "*Injunction*," Dec. Dig. (Key No.) § 22; Cent. Dig. §§ 20, 21.

<sup>55</sup> *Lindl. Partn.* (Wentw. Ed.) p. 539, note 1, citing *Ballou v. Wood*, 8 Cush. (Mass.) 48; *Stockdale v. Ullery*, 37 Pa. 486, 78 Am. Dec. 440; *Marshall v. Johnson*, 33 Ga. 500; *Kean v. Johnson*, 9 N. J. Eq. 401; *Roberts v. McKee*, 29 Ga. 161; *Rutland Marble Co. v. Ripley*, 10 Wall. 339, 19 L. Ed. 955. See "*Partnership*," Dec. Dig. (Key No.) §§ 118, 209, 324; Cent. Dig. §§ 181, 401, 402, 755, 756.

<sup>56</sup> *De Tastet v. Bordenave*, Jac. 516; *Wilson v. Fitcher*, 11 N. J. Eq. 71; *Marshall v. Watson*, 25 Beav. 501; *Charlton v. Poulter*, 19 Ves. 148, note. See "*Partnership*," Dec. Dig. (Key No.) § 324; Cent. Dig. §§ 755, 756.

<sup>57</sup> *Turner v. Major*, 3 Giff. 442; *Bradbury v. Dickens*, 27 Beav. 53. In the last case the defendant was advertising the discontinuance of a partnership periodical of which he was the editor. Angier

from getting in the assets if he is likely to misapply them.<sup>58</sup> A surviving partner will be restrained from improperly ejecting the representatives of his deceased copartner;<sup>59</sup> and they, on the other hand, will be restrained from making any improper use of partnership property, the legal estate of which may happen to be in them.<sup>60</sup> So a surviving partner will be restrained from disposing of or getting in the partnership assets, if he has already been guilty of breaches of trust with reference to them.<sup>61</sup> Again, in an action for a dissolution, a partner will be restrained from improperly interfering with or obstructing the partnership business;<sup>62</sup> from drawing accepting, or indorsing bills of exchange in the partnership name for other than partnership purposes;<sup>63</sup> from getting in debts owing to the firm;<sup>64</sup> from withholding the partnership books;<sup>65</sup> and, generally, on a dissolution, one partner will be restrained from injuring the property of the firm.<sup>66</sup>

v. Webber, 14 Allen (Mass.) 211, 92 Am. Dec. 748; Trego v. Hunt, 65 L. J. Ch. (N. S.) 1, 73 Law T. Rep. 514. See "*Partnership*," Dec. Dig. (Key No.) § 324; Cent. Dig. §§ 755, 756.

<sup>58</sup> O'Brien v. Cooke, Ir. R. 5 Eq. 51. There the plaintiff was allowed to get them in, indemnifying the defendant against costs, &c. See "*Partnership*," Dec. Dig. (Key No.) § 324; Cent. Dig. § 755.

<sup>59</sup> Elliot v. Brown, 3 Swanst. 489, note; Hawkins v. Hawkins, 4 Jur. (N. S.) 1045. See "*Partnership*," Dec. Dig. (Key No.) §§ 118, 258.

<sup>60</sup> Alder v. Fouracre, 3 Swanst. Ch. 489. See "*Partnership*," Dec. Dig. (Key No.) §§ 118, 258.

<sup>61</sup> Hartz v. Schrader, 8 Ves. 317. See "*Partnership*," Dec. Dig. (Key No.) §§ 118, 258.

<sup>62</sup> Smith v. Jeyes, 4 Beav. 503; Charlton v. Poulter, 19 Ves. 148, note. See "*Partnership*," Dec. Dig. (Key No.) § 324; Cent. Dig. § 755.

<sup>63</sup> Williams v. Bingley, 2 Vern. 278, note; Colly. Partn. 233; Jervis v. White, 7 Ves. 413; Hood v. Aston, 1 Russ. 412. In the two last cases, the injunction restrained mala fide indorsees for value from parting with or negotiating the securities. See "*Partnership*," Dec. Dig. (Key No.) §§ 118, 324; Cent. Dig. §§ 181, 755.

<sup>64</sup> Read v. Bowers, 4 Brown, Ch. 441. See "*Partnership*," Dec. Dig. (Key No.) §§ 118, 324; Cent. Dig. §§ 181, 755.

<sup>65</sup> Taylor v. Davis, 3 Beav. 388, note; Greatrex v. Greatrex, 1 De Gex & S. 692; Charlton v. Poulter, 19 Ves. 148, note. See "*Partnership*," Dec. Dig. (Key No.) §§ 118, 324; Cent. Dig. §§ 181, 755.

<sup>66</sup> See Marshall v. Watson, 25 Beav. 501, where an injunction to restrain a partner from publishing the accounts of the firm, was under special circumstances refused. See, also, as to making slander-

*Injunction to Enforce Special Agreements*

So, after a dissolution, the court constantly interferes by injunction to restrain breaches of special agreements entered into between the partners—such, for example, as agreements not to carry on business;<sup>67</sup> not to get in debts of the firm;<sup>68</sup> not to divulge a trade secret.<sup>69</sup> So, if a partner retires, and assigns his interest in the partnership and in the good will thereof to the continuing partners, he will be restrained from recommencing or carrying on business in such a way as to lead people to suppose that he is the successor of or still connected with the old firm.<sup>70</sup>

*Injunction in Case of Misconduct*

Equity will also enjoin the misconduct of partners. Mere squabbles and improprieties, arising from infirmities of temper, are not considered sufficient ground for an injunction;<sup>71</sup> but if one partner excludes his copartner from his rightful interference in the management of the partnership affairs, or if he persists in acting in violation of the partnership articles on any point of importance, or so grossly misconducts himself as to render it impossible for the business to be carried on in a proper manner, the court

ous statements and diverting letters, *Hermann Loog v. Bean*, 26 Ch. Div. 306, a case of agency, but applicable to partnerships.

So the court will interfere by injunction to protect partners from the interference of persons claiming the share of a late copartner by reason of his death or bankruptcy, or under an execution. *Phillips v. Atkinson*, 2 Brown, Ch. 272; *Bevan v. Lewis*, 1 Sim. 376; *Allen v. Kilbre*, 4 Madd. 464. See, also, ante, § 140, notes 35, 36, p. 416. See "*Partnership*," *Dec. Dig. (Key No.)* §§ 118, 324; *Cent. Dig.* §§ 181, 755.

<sup>67</sup> *Whittaker v. Howe*, 3 Beav. 383. See "*Partnership*," *Dec. Dig. (Key No.)* § 324; *Cent. Dig.* § 755.

<sup>68</sup> *Davis v. Amer*, 3 Drew, 64; *Hartz v. Schrader*, 8 Ves. 317; *Ellis v. Commander*, 1 Strob. Eq. (S. C.) 188. See "*Partnership*," *Dec. Dig. (Key No.)* § 324; *Cent. Dig.* § 755.

<sup>69</sup> *Morison v. Moat*, 9 Hare, 241; *Roberts v. McKee*, 29 Ga. 161. See "*Partnership*," *Dec. Dig. (Key No.)* § 324; *Cent. Dig.* § 755; "*Injunction*," *Dec. Dig. (Key No.)* § 56; *Cent. Dig.* § 110.

<sup>70</sup> *Churton v. Douglas*, Johns. Eng. Ch. 174. See "*Partnership*," *Dec. Dig. (Key No.)* §§ 230, 258; *Cent. Dig.* § 477½.

<sup>71</sup> See *Marshall v. Colman*, 2 Jac. & W. 266; *Smith v. Jeyes*, 4 Beav. 503; *Lawson v. Morgan*, 1 Price, 303; *Cofton v. Horner*, 5 Price, 537; *Warder v. Stilwell*, 3 Jur. (N. S.) 9. See "*Partnership*," *Dec. Dig. (Key No.)* §§ 88, 118; *Cent. Dig.* §§ 136, 181.

will interfere for the protection of the other partners.<sup>72</sup> Where, however, the partner complained of has by agreement been constituted the active managing partner, the court will not interfere with him unless a strong case be made out against him;<sup>73</sup> nor will the court restrain a partner from acting as such merely because, if he is known so to do, the confidence placed in the firm by the public will be shaken.<sup>74</sup>

### RECEIVERS

172. The appointment of a receiver of partnership property rests in the sound discretion of the court. This discretion is exercised subject to the following general rules:

- (a) A receiver will not be appointed unless a dissolution be sought, except

**EXCEPTIONS**—(1) Where a receiver is necessary to preserve the property until final hearing, and  
(2) Where a decree can be made for carrying on the concern according to certain terms, which the parties themselves have agreed upon.

<sup>72</sup> In *Anderson v. Wallace*, 2 Moll. 540, one of several partners who horsed a mail coach was restrained from horsing it on the ground that he did it so badly as to imperil the business of the concern. See "*Partnership*," *Dec. Dig. (Key No.)* §§ 79, 118; *Cent. Dig.* §§ 127, 181.

<sup>73</sup> *Lawson v. Morgan*, 1 Price, 308; *Waters v. Taylor*, 15 Ves. 10. See, also, *Walker v. Hirsch*, 27 Ch. Div. 460. See "*Partnership*," *Dec. Dig. (Key No.)* §§ 79, 118; *Cent. Dig.* §§ 127, 181.

<sup>74</sup> *Anon*, 2 Kay & J. 441.

Partner applying for injunction must come with clean hands. *Smith v. Fromont*, 2 Swanst. Ch. 330; *Littlewood v. Caldwell*, 11 Price, 97, where an injunction was refused, because the plaintiff had taken away the partnership books; *Rutland Marble Co. v. Ripley*, 10 Wall. 339, 19 L. Ed. 955. See, also, *Const v. Harris*, *Turn. & H.* 496, 524.

An injunction will also be granted to sustain a person from holding out another as partner with him without the authority of that other. See *Routh v. Webster*, 10 Beav. 561; *Bullock v. Chapmen*, 2 De Gex & S. 211; *De Groot v. Peters*, 124 Cal. 406, 57 Pac. 209, 71 Am. St. Rep. 91, *Lindl Partn.* 544. See "*Partnership*," *Dec. Dig. (Key No.)* § 118; *Cent. Dig.* § 181.

- (b) Before dissolution, a receiver will not be appointed, unless it appears that plaintiff will be entitled to a decree of dissolution, and that defendant has been guilty of improper conduct.
- (c) Where a decree of dissolution has been entered on account of the improper conduct of the parties, a receiver will be appointed as a matter of course.
- (d) After dissolution, a receiver will be appointed only where it appears either that a partner is misconducting himself, or that the assets are in peril.<sup>75</sup>

*Principles on Which a Receiver is Appointed*

Where an application is made for a receiver in partnership cases, the court is always placed in a position of very great difficulty. On the one hand, if it grants the motion, the effect of it is to put an end to the partnership, which one of the parties claims a right to have continued; and, on the other hand, if it refuses the motion, it leaves the defendant at liberty to go on with the partnership business at the risk, and probably to the great loss and prejudice, of the dissenting party. Between these difficulties it is not very easy to select the course which is best to be taken, but the court is under the necessity of adopting some mode of proceeding to protect, according to the best view it can take of the matter, the interests of both parties.<sup>76</sup>

In granting or refusing an order for a receiver in partnership cases, the court does not act on the same principles on which it grants or refuses an order for an injunction. In granting a receiver of a partnership, the court takes the affairs of the partnership out of the hands of all the partners, and intrusts them to a receiver or manager of its own appointment. In granting an injunction, the court does not take the affairs of the partnership into its own hands,

<sup>75</sup> The text of this section is substantially reproduced from Kerr on Receivers.

<sup>76</sup> *Madgwick v. Wimble*, 6 Beav. 495, 500; *Blakeney v. Dufaur*, 15 Beav. 40, 42. Equity has inherent jurisdiction to appoint a receiver independent of statute. *Cox v. Volkert*, 86 Mo. 505. See "*Partnership*," *Dec. Dig. (Key No.)* §§ 119, 210, 258, 325; *Cent. Dig.* §§ 181½, 403, 576½, 757-767.

but only restrains one or more of the partners from doing what may be complained of. The order for a receiver excludes all the partners from taking any part in the management of the concern. The order for an injunction merely restrains one of the partners, who may have acted in breach of the partnership articles, or may have otherwise misconducted himself, from continuing to act in the way complained of.<sup>77</sup> It, therefore, does not follow that, because the court will grant an injunction, it will also appoint a receiver, or that, because it refuses to appoint a receiver, it will also decline to interfere by injunction.<sup>78</sup> In every case where complaints are made of breaches of articles, it must be seen whether they are urged with a view of making them the foundation of a dissolution, or of a decree enforcing and carrying on the partnership according to the original terms, and preventing, by proper means, those breaches recurring which have before happened by reason of the conduct of the parties.<sup>79</sup>

*Receiver Not Appointed Unless a Dissolution be Sought*

It is not according to the practice of the court, where it is not the object of the suit to obtain a dissolution of a partnership, but, on the contrary, to continue the partnership, to grant, in the course of that suit, the appointment of a receiver.<sup>80</sup> The court does not interfere with the management of a partnership, except as incidental to the ob-

<sup>77</sup> Hall v. Hall, 3 Macn. & G. 79, 86. See "*Partnership*," Dec. Dig. (Key No.) §§ 119, 210, 258, 325; Cent. Dig. §§ 181½, 403, 576½, 757-767.

<sup>78</sup> Hall v. Hall, 12 Beav. 414, 3 Macn. & G. 79; Read v. Bowers, 4 Brown, Ch. 441; Hartz v. Schrader, 8 Ves. 317. See, also, Garetson v. Weaver, 3 Edw. Ch. (N. Y.) 385; Low v. Holmes, 17 N. J. Eq. 148. See "*Partnership*," Dec. Dig. (Key No.) §§ 119, 210, 258, 325; Cent. Dig. §§ 181½, 403, 576½, 757-767.

<sup>79</sup> Hall v. Hall, 12 Beav. 414, 3 Macn. & G. 79; Goodman v. Whitcomb, 1 Jac. & W. 589, 593. See "*Partnership*," Dec. Dig. (Key No.) §§ 119, 325; Cent. Dig. §§ 181½, 757-767.

<sup>80</sup> Goodman v. Whitcomb, 1 Jac. & W. 589, 593; Hall v. Hall, 12 Beav. 414, 3 Macn. & G. 79; Roberts v. Eberhardt, Kay, 148; Campbell v. Rich Oil Co., 96 S. W. 442, 29 Ky. Law Rep. 716. Disagreements between partners, insufficient as a ground for dissolution, are not sufficient to sustain the appointment of a receiver. SLOAN v. MOORE, 37 Pa. 217, Gilmore, Cas. Partnership, 231; McElvey v.

ject of the suit—to wind up the concern and divide the assets.<sup>81</sup> If the court were not to adopt such a rule, it might be called upon to make itself the manager of every trade in the country.<sup>82</sup>

*Same—Exceptions*

Cases, however, may arise in which a partner was so conducting himself that, unless a receiver was appointed before the hearing, the partnership concern might in the meantime be destroyed. In such case the court would appoint an interim receiver.<sup>83</sup> A receiver would also, there is no reason to doubt, be appointed, although the dissolution of the partnership were not sought, in a case where the question was one of the receipt of money only, and where, if the money were allowed to be received by the parties, it would not be applied to its proper purposes, and thus, at the hearing, there would be a failure of justice, unless the court interposed in the meantime.<sup>84</sup>

*Necessity of Prayer for Dissolution*

It is not necessary, in order to induce the court to appoint a receiver, that the bill should expressly pray for a dissolution. It is enough that it be plain that it is necessary to put an end to the concern.<sup>85</sup> If such be the case, the case stands upon precisely the same basis as if the bill had been filed exclusively for the purpose of the dissolution, and the winding up of the concern.<sup>86</sup> The court will in all cases

Lewis, 76 N. Y. 373. See "Partnership," Dec. Dig. (Key No.) §§ 119, 325; Cent. Dig. §§ 181½, 757-767.

<sup>81</sup> Waters v. Taylor, 15 Ves. 10, 13. See "Partnership," Dec. Dig. (Key No.) §§ 119, 325; Cent. Dig. §§ 181½, 757-767.

<sup>82</sup> Goodman v. Whitcomb, 1 Jac. & W. 589, 592; Roberts v. Eberhardt, Kay, 148. See "Partnership," Dec. Dig. (Key No.) §§ 119, 325; Cent. Dig. §§ 181½, 757-767.

<sup>83</sup> Hall v. Hall, 12 Beav. 414, 3 Macn. & G. 79; Gillett v. Higgins, 142 Ala. 444, 38 South. 664. See "Partnership," Dec. Dig. (Key No.) §§ 119, 325; Cent. Dig. §§ 181½, 757-767.

<sup>84</sup> Hall v. Hall, 12 Beav. 414, 3 Macn. & G. 79. See "Partnership," Dec. Dig. (Key No.) §§ 119, 325; Cent. Dig. §§ 181½, 757-767.

<sup>85</sup> Wallworth v. Holt, 4 Mylne & C. 619. See "Partnership," Dec. Dig. (Key No.) § 325; Cent. Dig. §§ 757-767.

<sup>86</sup> Hall v. Hall, 3 Macn. & G. 80. See "Partnership," Dec. Dig. (Key No.) § 325; Cent. Dig. §§ 757-767.

entertain an application for a receiver if the object of the suit is to wind up the partnership affairs, and the appointment of a receiver is sought with that view.<sup>87</sup>

The mere fact that the bill may pray a dissolution is not a sufficient ground for the appointment of a receiver, unless a state of facts is shown upon the bill as will, if proved at the hearing, entitle the plaintiff to a decree for dissolution.<sup>88</sup> The court will not, upon motion, appoint a receiver, unless it sees that there is an actual present dissolution, arising from the acts of the parties, or that, at the hearing, it will dissolve the partnership. If there has been no misconduct, or no such violation of the articles as to entitle the plaintiff to a dissolution, a receiver will not be appointed.<sup>89</sup> If, however, the court sees its way to a dissolution at the hearing, there is a case for a receiver.<sup>90</sup>

*Receiver Not Ordered in Every Case Where a Case for Dissolution is Made*

The court will not, as a matter of course, appoint a receiver of the partnership assets even where a case for dissolution is made.<sup>91</sup> The very basis of a partnership con-

<sup>87</sup> Sheppard v. Oxenford, 1 Kay & J. 491; Hubbard v. Curtis, 8 Clarke (Iowa) 1, 74 Am. Dec. 283; Saylor v. Mockble, 9 Iowa, 209; Evans v. Coventry, 5 De Gex, M. & G. 911. See "Partnership," Dec. Dig. (Key No.) § 325; Cent. Dig. §§ 757-767.

<sup>88</sup> Goodman v. Whitcomb, 1 Jac. & W. 589; Roberts v. Eberhardt, Kay, 148; Smith v. Jeyes, 4 Beav. 503. See "Partnership," Dec. Dig. (Key No.) § 325; Cent. Dig. §§ 757-767.

<sup>89</sup> Baxter v. West, 28 Law J. Ch. 169; Rische v. Rische, 46 Tex. Civ. App. 23, 101 S. W. 849; Campbell v. Rich Oil Co., 96 S. W. 442, 29 Ky. Law Rep. 716. See "Partnership," Dec. Dig. (Key No.) § 325; Cent. Dig. §§ 757-767.

<sup>90</sup> Marsden v. Kaye, 30 Law T. 197; Gowan v. Jeffries, 2 Ashm. 296; Gillett v. Higgins, 142 Ala. 444, 38 South. 664. If the case made stands in such a state that the court cannot see whether or not there shall be a decree for dissolution at the hearing, it will not take into its own hands the conduct of a partnership, although it may be dissolved. Goodman v. Whitcomb, 1 Jac. & W. 592. See, also, as to appointment on interlocutory application, Baxter v. West, 28 Law J. Ch. 169; at the hearing, Id., 1 Drew & G. 173, 175; Waters v. Taylor, 15 Ves. 25; Bailey v. Ford, 13 Sim. 495; Bowker v. Henry, 6 Law T. (N. S.) 43. See "Partnership," Dec. Dig. (Key No.) § 325; Cent. Dig. §§ 757-767.

<sup>91</sup> Harding v. Glover, 18 Ves. 281; Fairburn v. Pearson, 2 Macn.

tract being the mutual confidence reposed in each other by the parties,<sup>92</sup> the court will not appoint a receiver in a suit between members of the partnership firm unless some special ground for its interference be established.<sup>93</sup> It must appear that the member of the firm against whom the appointment of a receiver is sought has done acts which are inconsistent with the duty of a partner, and are of a nature to destroy the mutual confidence which ought to subsist between the parties.<sup>94</sup>

& G. 145; Slemmer's Appeal, 58 Pa. 168, 98 Am. Dec. 255; Waters v. Taylor, 15 Ves. 10; Cox v. Peters, 13 N. J. Eq. 39; Renton v. Chaplain, 9 N. J. Eq. 62; Quinlivan v. English, 44 Mo. 46; Lawrence Lumber Co. v. A. J. Lyon & Co., 93 Miss. 859, 47 South. 849; Marshall v. Matson, 171 Ind. 238, 86 N. E. 339.

It is held that, where the firm is admittedly dissolved, the appointment of receiver follows as a matter of course. Nathan v. Bacon, 75 N. J. Eq. 401, 72 Atl. 359; Bond v. May, 38 Ind. App. 396, 78 N. E. 260. See "Partnership," Dec. Dig. (Key No.) § 325; Cent. Dig. §§ 757-767.

<sup>92</sup> Phillips v. Atkinson, 2 Brown, Ch. 272. See Peacock v. Peacock, 16 Ves. 51; Sieghortner v. Weissenborn, 20 N. J. Eq. 172; Garretson v. Weaver, 3 Edw. Ch. (N. Y.) 385. See "Partnership," Dec. Dig. (Key No.) §§ 1, 70; Cent. Dig. § 114.

<sup>93</sup> Harding v. Glover, 18 Ves. 281. See, also, Slemmer's Appeal, 58 Pa. 168, 98 Am. Dec. 255; Tomlinson v. Ward, 2 Conn. 396; Terrell v. Goddard, 18 Ga. 664; Parkhurst v. Muir, 7 N. J. Eq. 307; Smith v. Brown, 50 Wash. 240, 96 Pac. 1077; Whilden v. Chapman, 80 S. C. 84, 61 S. E. 249; Jones v. Weir, 217 Pa. 321, 66 Atl. 550; Campbell v. Rich Oil Co., 96 S. W. 442, 29 Ky. Law Rep. 716. See "Partnership," Dec. Dig. (Key No.) §§ 119, 325; Cent. Dig. §§ 181½, 757-767.

<sup>94</sup> Smith v. Jeyes, 4 Beav. 505; Peacock v. Peacock, 16 Ves. 51; Chapman v. Beach, 1 Jac. & W. 594, note. Williamson v. Wilson, 1 Bland (Md.) 418, 426; Whipple v. Lee, 46 Wash. 266, 89 Pac. 712; New v. Wright, 44 Miss. 202; Rutland Marble Co. v. Ripley, 10 Wall. 339, 19 L. Ed. 955; Drew v. Beard, 107 Mass. 64; Wilson v. Fitchter, 11 N. J. Eq. 71; SHANNON v. WRIGHT, 60 Md. 520, Gilmore, Cas. Partnership, 481; Cox v. Volkert, 86 Mo. 505; Stockdale v. Ullery, 37 Pa. 486, 78 Am. Dec. 440; Fairthorne v. Weston, 3 Hare, 387.

Upon a bill between partners for closing the affairs of a partnership after the dissolution of the firm, the insolvency of the defendant will entitle the complainant to the appointment of a receiver and an injunction. Randall v. Morrell, 17 N. J. Eq. 343. See "Partnership," Dec. Dig. (Key No.) §§ 119, 325; Cent. Dig. §§ 181½, 757-767.

*Death or Bankruptcy of One Member of a Firm Not a Ground for a Receiver*

The death or bankruptcy of one of the members of a firm is not of itself a ground for the appointment of a receiver as against the surviving or solvent partner or partners. The mutual confidence which the members of the firm reposed in each other at the date of the contract, and which formed the very basis of the partnership contract, is not, as regards the surviving or solvent partner or partners, affected by the death or insolvency of one of the members of the firm.<sup>95</sup> If a partner dies or becomes bankrupt, a right to wind up the partnership concern, and collect the assets, is by law vested in the surviving<sup>96</sup> or solvent<sup>97</sup> partner or partners, as the case may be. Before the court will interfere and appoint a receiver, some breach or neglect of duty on their part must be established.<sup>98</sup>

<sup>95</sup> *Phillips v. Atkinson*, 2 Brown, Ch. 272. See "*Partnership*," Dec. Dig. (Key No.) § 325; Cent. Dig. §§ 759, 760.

<sup>96</sup> *Collins v. Young*, 1 Macq. 385. See *Phillips v. Atkinson*, 2 Brown, Ch. 272. See, also, ante, § 122, p. 353. See "*Partnership*," Dec. Dig. (Key No.) §§ 243-257, 277-287; Cent. Dig. §§ 509-563, 622-650.

<sup>97</sup> *Freeland v. Stansfeld*, 2 Smale & Giff. 479, 487; *Fraser v. Kershaw*, 2 Kay & J. 496, 499. See, also, ante, § 151, p. 453. See "*Partnership*," Dec. Dig. (Key No.) §§ 277-287; Cent. Dig. §§ 622-650.

<sup>98</sup> *Collins v. Young*, 1 Macq. 385; *Horrell v. Witts*, L. R. 1 Prob & Div. 103; *Renton v. Chaplain*, 9 N. J. Eq. 62; *Walker v. House*, 4 Md. Ch. 39, 45; *Hamill v. Hamill*, 27 Md. 679; *Jones v. Weir*, 217 Pa. 321, 66 Atl. 550. "It is consequently a matter of course to appoint a receiver when all the partners are dead and a suit is pending between their representatives." Kerr, Rec. p. 94; *Phillips v. Atkinson*, 2 Brown, Ch. 272. So, also, when such appointment is sought by a partner against the representatives or assignees in bankruptcy of his late copartner. *Freeland v. Stansfeld*, 16 Jur. 792, 2 Smale & Giff. 479. See, also, *Fraser v. Kershaw*, 2 Kay & J. 496. Where there is an unreasonable delay on the part of the surviving partners in closing the affairs of the partnership, or if they are wasting the partnership assets, a receiver will be appointed, on the application of the administrator of the deceased partner. *Miller v. Jones*, 39 Ill. 54. See, also, *Holden's Adm'rs v. McMakin*, 1 Pars. Eq. Cas. (Pa.) 270; *SHANNON v. WRIGHT*, 60 Md. 520, *Gillmore, Cas. Partnership*, 481. When one partner, who is insolvent, or in failing circumstances, without the consent and against the will of the other partner, is disposing of the effects of the partnership, and

*Misconduct of Partner a Ground for a Receiver*

The ground on which the court is most commonly asked to appoint a receiver is where, by the misconduct of a partner, his right of personal intervention in the partnership affairs has been forfeited, and the partnership funds are in danger of being lost. Mere quarrels and disagreements between the partners, arising from infirmities of temper, are not a sufficient ground for the interference of the court.<sup>99</sup> The due winding up of the affairs of the concern must be endangered to induce the court to appoint a receiver.<sup>1</sup> The non-coöperation of one partner, whereby the whole responsibility of management is thrown on his copartner, is not sufficient.<sup>2</sup> Where, however, a partner has so misconducted himself as to show that he is no longer to be trusted—as, for example, if one partner colludes with the debtors of the firm, and allows them to delay pay-

appropriating them to his own use, the other has a right to an injunction, and to have a receiver appointed. *Phillips v. Trezevant*, 67 N. C. 370. After dissolution of the firm, whether by mutual agreement or by the death of one of its members, a receiver will be appointed, where it appears that the partners in possession are misconducting themselves, or that the assets are in peril. *Word v. Word*, 90 Ala. 81, 7 South. 412; *Bufkin v. Boyce*, 104 Ind. 53, 3 N. E. 615; *Davis v. Grove*, 2 Rob. (N. Y.) 134, 635. See "*Partnership*," *Dec. Dig. (Key No.)* §§ 119, 325; *Cent. Dig.* §§ 181½, 757-767.

<sup>99</sup> *Goodman v. Whitcomb*, 1 Jac. & W. 589, 593; *Marshall v. Colman*, 2 Jac. & W. 266; *Smith v. Jeyes*, 4 Beav. 503, 504; *McElvey v. Lewis*, 76 N. Y. 373; *HENN v. WALSH*, 2 Edw. Ch. (N. Y.) 129, *Gilmore, Cas. Partnership*, 588; *SLOAN v. MOORE*, 37 Pa. 217, *Gilmore, Cas. Partnership*, 231; *Loomis v. McKenzie*, 31 Iowa, 425. And see *Kennedy v. Kennedy*, 3 Dana (Ky.) 239. See "*Partnership*," *Dec. Dig. (Key No.)* §§ 119, 325; *Cent. Dig.* §§ 181½, 757-767.

<sup>1</sup> *Goodman v. Whitcomb*, 1 Jac. & W. 589, 593; *Smith v. Jeyes*, 4 Beav. 503, 505. Where each partner attempts separately to make an assignment of the partnership assets for the benefit of creditors to separate assignees, each of whom notifies the firm debtors not to pay the amount owing the firm to the other, the appointment of a receiver for the partnership is proper. *Fox v. Curtis*, 176 Pa. 52, 34 Atl. 952. See "*Partnership*," *Dec. Dig. (Key No.)* § 325; *Cent. Dig.* §§ 757-767.

<sup>2</sup> *Roberts v. Eberhardt*, Kay, 148; *Rowe v. Wood*, 2 Jac. & W. 556; *Smith v. Lowe*, 1 Edw. Ch. (N. Y.) 33. See "*Partnership*," *Dec. Dig. (Key No.)* § 325; *Cent. Dig.* §§ 757-767.

ing their debts;<sup>3</sup> or is carrying on a separate trade on his own account with the partnership property;<sup>4</sup> or if a surviving partner insists on carrying on the business, and employing therein the assets of his deceased partner;<sup>5</sup> or where, the partnership property being abroad, one of the partners goes off in order to do what he likes with it;<sup>6</sup> or if the persons having the control of the partnership assets have already made away with some of them;<sup>7</sup> or if there has been such mismanagement as to endanger the whole concern;<sup>8</sup> or if one of the partners has acted in a manner inconsistent with the duties and obligations which are implied in every partnership contract<sup>9</sup>—in all such cases a receiver will be appointed.

There is a case for a receiver, even although there be no misconduct endangering the partnership assets, if one partner excludes another partner from the management of the

<sup>3</sup> *Estwick v. Conningsby*, 1 Vern. 118. In *Whilden v. Chapman*, 80 S. C. 84, 61 S. E. 249, a receiver was appointed where one partner had permitted a creditor to obtain a judgment against the firm by default on service of summons on him alone. See "*Partnership*," *Dec. Dig. (Key No.)* §§ 119, 325; *Cent. Dig.* §§ 181½, 757-767.

<sup>4</sup> *Harding v. Glover*, 18 Ves. 281. See "*Partnership*," *Dec. Dig. (Key No.)* §§ 119, 325; *Cent. Dig.* §§ 181½, 757-767.

<sup>5</sup> *Madgwick v. Wimble*, 6 Beav. 495. See *Crawshay v. Maule*, 1 Swanst. 507; *Miller v. Jones*, 39 Ill. 54; *Holden's Adm'rs v. McMakin*, 1 Pars. Eq. Cas. (Pa.) 270. See "*Partnership*," *Dec. Dig. (Key No.)* §§ 119, 258, 325; *Cent. Dig.* §§ 181½, 757-767.

<sup>6</sup> *Sheppard v. Oxenford*, 1 Kay & J. 491. See "*Partnership*," *Dec. Dig. (Key No.)* §§ 119, 325; *Cent. Dig.* §§ 181½, 757-767.

<sup>7</sup> *Evans v. Coventry*, 5 De Gex, M. & G. 911. See "*Partnership*," *Dec. Dig. (Key No.)* §§ 119, 325; *Cent. Dig.* §§ 181½, 757-767.

<sup>8</sup> *De Tastet v. Bordicu*, cited 2 Brown, Ch. 272; *Jefferys v. Smith*, 1 Jac. & W. 298; *Hall v. Hall*, 3 Macn. & G. 79; *Cohn v. Wahn*, 132 App. Div. 849, 117 N. Y. Supp. 633; *Reinhardt v. Reinhardt*, 134 App. Div. 440, 119 N. Y. Supp. 285. See "*Partnership*," *Dec. Dig. (Key No.)* §§ 119, 325; *Cent. Dig.* §§ 181½, 757-767.

<sup>9</sup> *Smith v. Jeyes*, 4 Beav. 505; *Saylor v. Mockble*, 9 Iowa, 209. See, generally, *Boyce v. Burchard*, 21 Ga. 74; *SUTRO v. WAGNER*, 23 N. J. Eq. 388, *Gillmore, Cas. Partnership*, 483; *Evans v. Evans*, 9 Paige (N. Y.) 178; *Jacquín v. Buisson*, 11 How. Prac. (N. Y.) 385; *Haight v. Burr*, 19 Md. 130; *Maher v. Bull*, 44 Ill. 97. See "*Partnership*," *Dec. Dig. (Key No.)* §§ 119, 325; *Cent. Dig.* §§ 181½, 757-767.

partnership affairs.<sup>10</sup> This doctrine is acted on where the defendant contends that the plaintiff is not a partner,<sup>11</sup> or that he has no interest in the partnership assets.<sup>12</sup>

Inasmuch as the court will not appoint a receiver against a partner unless some special ground for doing so can be shown, it follows that in a firm of several members there is more difficulty in obtaining a receiver than in a firm of two. For the appointment of a receiver operating in fact as an injunction against the members, there must be some ground for excluding all who oppose the application. If the object is to exclude some or one only from intermeddling, the appropriate remedy is rather by injunction than by a receiver.<sup>13</sup>

<sup>10</sup> *Wilson v. Greenwood*, 1 Swanst. 481; *Goodman v. Whitcomb*, 1 Jac. & W. 592; *Rowe v. Wood*, 2 Jac. & W. 558; *Const v. Harris*, Turn. & R. 525; *KATZ v. BREWINGTON*, 71 Md. 79, 20 Atl. 139, *Gilmore, Cas. Partnership*, 433 (cf. *Kershaw v. Matthews*, 2 Russ. 62); *Hottenstein v. Conrad*, 9 Kan. 435; *Shulte v. Hoffman*, 18 Tex. 678; *Rische v. Rische*, 46 Tex. Civ. App. 23, 101 S. W. 849; *Holder v. Shelby* (Tex. Civ. App.) 118 S. W. 590; *Barnes v. Jones*, 91 Ind. 161; *Heathcot v. Ravenscroft*, 6 N. J. Eq. 113. In *Maynard v. Ralley*, 2 Nev. 313, it was held that a receiver would be appointed where one partner excludes his copartner from the participation in the affairs of the partnership, or when both partners have assigned their respective interests, and the assignees cannot agree. In *Marten v. Van Schaick*, 4 Paige (N. Y.) 479, Chancellor Walworth says: "Each partner has an equal right in this case to the possession and control of the partnership effects in business, and, if they cannot agree among themselves, it is a matter of course to appoint a receiver, upon a bill filed to close the partnership concerns, on the application of either party." See, also, *Van Rensselaer v. Emery*, 9 How. Prac. (N. Y.) 135; *McElvey v. Lewis*, 76 N. Y. 373; *Richards v. Baurman*, 65 N. C. 162; *SLOAN v. MOORE*, 37 Pa. 217, *Gilmore, Cas. Partnership*, 231. See "*Partnership*," *Dec. Dig. (Key No.)* §§ 119, 325; *Cent. Dig.* §§ 181½, 757-767.

<sup>11</sup> *Peacock v. Peacock*, 16 Ves. 49; *Blakeney v. Dufaur*, 15 Beav. 40. See "*Partnership*," *Dec. Dig. (Key No.)* §§ 119, 325; *Cent. Dig.* §§ 181½, 757-767.

<sup>12</sup> *Hale v. Hale*, 4 Beav. 369.

See, also, *Sheppard v. Oxenford*, 1 Kay & J. 491, 492, where a receiver was appointed, although the legality of the partnership was denied. See "*Partnership*," *Dec. Dig. (Key No.)* §§ 119, 325; *Cent. Dig.* §§ 181½, 757-767.

<sup>13</sup> *Kerr*, Rec. p. 98; *Hall v. Hall*, 3 Macn. & G. 79. See "*Partnership*," *Dec. Dig. (Key No.)* §§ 119, 325; *Cent. Dig.* §§ 181½, 757-767.

*Course of Court Where the Partnership is Denied*

Where a partnership is alleged on the one side, and denied on the other, and a motion is made for a receiver, the court, if it directs an issue as to partnership or no partnership, usually declines to appoint a receiver until that question is determined.<sup>14</sup>

<sup>14</sup> Kerr, Rec. p. 98; Peacock v. Peacock, 16 Ves. 49; Chapman v. Beach, 1 Jac. & W. 594, note; Fairburn v. Pearson, 2 Macn. & G. 144; Norway v. Rowe, 19 Ves. 144; Baxter v. Buchanan, 3 Brewst. (Pa.) 435; Hobart v. Ballard, 31 Iowa, 521; Guyton v. Flack, 7 Md. 398; Speights v. Peters, 9 Gill (Md.) 472. A receiver will not be appointed in a proceeding to dissolve a partnership where the partnership is denied, unless the court is satisfied that there is in fact a partnership between the parties, or that the fund is in danger. McCarty v. Stanwix, 16 Misc. Rep. 132, 38 N. Y. Supp. 820.

The existence of the partnership must be established as a prerequisite to a receiver. Rische v. Rische, 46 Tex. Civ. App. 23, 101 S. W. 849.

Another case in which the court may be called upon to appoint a receiver is where the partners have, by agreement, divested themselves more or less of their right to wind up the affairs of the concern. Davis v. Amer, 3 Drew. 64. See, also, Turner v. Major, 3 Giff. 442. When both partners have assigned their respective interests, and the assignees cannot agree, a receiver will be appointed. Maynard v. Ralley, 2 Nev. 313. See "Partnership," Dec. Dig. (Key No.) §§ 119, 325; Cent. Dig. §§ 181½, 757-767.

## CHAPTER IX

### ACTIONS BETWEEN PARTNERS AND THIRD PERSONS

- 173. In General.
- 174. Parties to Actions by the Firm.
- 175. Claims Arising Ex Contractu.
- 176. Contracts in Firm Name.
- 177. Contracts in Name of Partner.
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- 179. Parties to Actions against the Firm.
- 180. Liabilities Arising Ex Contractu.
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- 182. Effect of Changes in Firm.
- 183-185. Admission of New Member.
- 186-188. Retirement of Old Member.
- 189. Death of Member.
- 190-193. Bankruptcy and Insolvency.
- 194. Disqualification of One Partner to Sue.
- 195. Action in Firm Name.

### IN GENERAL

173. Actions between partners and third persons are in the main governed by ordinary principles. The chief peculiarities relate
- (a) To parties, and
  - (b) To actions where one partner is disqualified to sue.

### PARTIES TO ACTIONS BY THE FIRM

174. It is a general rule that all partners must join as parties plaintiff in an action to enforce a partnership claim. This will be considered under the following heads:
- (a) Claims arising ex contractu (p. 531).
  - (b) Claims arising ex delicto (p. 540).

# **SAME—CLAIMS ARISING EX CONTRACTU**

175. The question as to parties plaintiff in actions on partnership claims *ex contractu* arises in two classes of cases:

- (a) Where the contract was made in the name of the firm (p. 533), and
- (b) Where the contract was made in the name of one partner on behalf of the firm (p. 536).

176. **CONTRACTS IN FIRM NAME**—Actions upon contracts made in the firm name must be brought in name of all the persons who were actual partners at the time the contract was made, except

## **EXCEPTIONS:**

- (a) Dormant partners are proper but not necessary parties (p. 532).
- (b) Nominal partners need not be made parties unless expressly named in the contract (p. 532).

It has been seen that the firm, as an entity, does not exist in contemplation of law, and that the firm name is merely a convenient symbol to indicate all the partners jointly.<sup>1</sup> A contract made in the partnership name is, therefore, a contract made with all the partners jointly, and it is familiar law that in such a case, all the persons with whom the contract was made must join in an action to enforce it.<sup>2</sup> The effect of changes in the firm, as by the

<sup>1</sup> See ante, chapter III, § 41, p. 118.

<sup>2</sup> *MASON v. ELDRED*, 6 Wall. 231, 18 L. Ed. 783, Gilmore, Cas. Partnership, 281; *Seely v. Schenck*, 2 N. J. Law, 75; *Reed v. Hanover Branch Railroad Co.*, 105 Mass. 303; *Choteau v. Raitt*, 20 Ohio, 132; *Vinal v. West Virginia Oil & Oil Land Co.*, 110 U. S. 215, 4 Sup. Ct. 4, 28 L. Ed. 124; *Cushing v. Marston*, 12 Cush. (Mass.) 431; *Moore v. Burns*, 60 Ala. 269; *Phillips v. Holmes* (Ala.) 51 South. 625; *Johnson, Nesbitt & Co. v. First Nat. Bank of Gadsden*, 145 Ala. 378, 40 South. 78; *Fish v. Gates*, 133 Mass. 441; *Ives v. Muhlenburg*, 135 Ill. App. 525; *Bruett & Co. v. F. C. Austin Drainage Excavator Co.* (C. C.) 174 Fed. 668; *Crosby v. Hammerling* (C. C.) 170 Fed. 857. As partners cannot be sued otherwise than in

admission of a new member, or the retirement of an old one, has already been considered.<sup>3</sup>

#### *Dormant Partners*

In partnership transactions, dormant partners occupy the position of undisclosed principals. They may, therefore, join as plaintiffs in an action on a contract entered into on behalf of the firm of which they are members. But dormant partners never need be joined as plaintiffs in such an action. The action may be brought by the ostensible partners alone, for they are the persons with whom the contract was expressly made. In other words, dormant partners are proper, but not necessary, parties.<sup>4</sup>

#### *Nominal Partners*

A nominal partner is a person who appears to be a partner, but is not so. He sometimes must, and sometimes need not, join in an action on a contract made with the firm.<sup>5</sup>

First. If a contract is made expressly with a real and with a nominal partner, they must join in suing on it.<sup>6</sup> Thus, if a nominal partner's name is on a bill of exchange or promissory note, he must be a party to the action

their individual names, the allegation of a partnership name need not be proven, but may be regarded as surplusage. *Courson v. Parker*, 39 W. Va. 521, 20 S. E. 583.

A judgment in the firm name is irregular, but not void. *Meyer v. Wilson*, 166 Ind. 651, 76 N. E. 748. See "*Partnership*," *Dec. Dig. (Key No.)* §§ 197-202, 213; *Cent. Dig.* §§ 360-374, 408, 409.

<sup>3</sup> See ante, chapter IV, § 77, p. 242, and § 78, p. 249.

<sup>4</sup> *Wood v. O'Kelley*, 8 Cush. (Mass.) 406; *Hilliker v. Loop*, 5 Vt. 116, 26 Am. Dec. 286; *Platt v. Halen*, 23 Wend. (N. Y.) 456; *Wilson v. Wallace*, 8 Serg. & R. (Pa.) 53; *Desha v. Holland*, 12 Ala. 513, 46 Am. Dec. 261; *Monroe v. Ezzell*, 11 Ala. 603. See *Seymour v. Western Railroad Co.*, 106 U. S. 320, 1 Sup. Ct. 123, 27 L. Ed. 103; *Secor v. Keller*, 4 Duer (N. Y.) 416; *Howe v. Savory*, 51 N. Y. 631; *Id.*, 49 Barb. (N. Y.) 403; *Allen v. Fleck* (Tex. Civ. App.) 118 S. W. 176; *Masterson v. F. W. Heltmann & Co.*, 38 Tex. Civ. App. 476, 87 S. W. 227. See "*Partnership*," *Dec. Dig. (Key No.)* §§ 199, 200; *Cent. Dig.* §§ 366, 370.

<sup>5</sup> *Dacey, Parties*, p. 172.

<sup>6</sup> *GUIDON v. ROBSON*, 2 Camp. 302. Cf. *Teed v. Elworthy*, 14 East, 210. See "*Partnership*," *Dec. Dig. (Key No.)* §§ 198, 199; *Cent. Dig.* §§ 361-368.

brought upon it; and the same rule applies to actions on contracts under seal.<sup>7</sup>

Secondly. *Prima facie*, a nominal partner ought to join in suing on any contract, whether express or implied, made with the firm; for an agreement with the firm is, *prima facie*, an agreement with the persons who apparently make up the firm. But, if it be distinctly shown that a person who is apparently the member of a firm is in reality not so—i. e. that he is merely a nominal partner—a contract made with the firm is not in reality made with him, and he need not join in suing upon it.<sup>8</sup>

Thirdly. It is an open question whether a nominal partner can join in cases in which it has been established that there is no necessity for his joining. As a misjoinder is a much less serious error than a nonjoinder of plaintiffs, a nominal partner should, as a matter of prudence, join in all actions on contracts made with the firm.<sup>9</sup>

**177. CONTRACTS IN NAME OF PARTNER**—Actions on contracts made in the name of one partner, but on behalf of the firm, must be brought by all the members jointly who composed the firm at the time the contract was made, except

**EXCEPTIONS:**

- (a) In the following cases the action must be brought in the name of the contracting partner alone:
  - (1) Where the contract is under seal (p. 535).
  - (2) Where the contract is a negotiable instrument (p. 535).

<sup>7</sup> *GUIDON v. ROBSON*, 2 Camp. 302. See "*Partnership*," *Dec. Dig.* (Key No.) §§ 198–200; *Cent. Dig.* §§ 361–371.

<sup>8</sup> Cf. *Teed v. Elworthy*, 14 East, 210, with *KELL v. NAINBY*, 10 Barn. & C. 20. See *Bates, Partn.* § 1023. See "*Partnership*," *Dec. Dig.* (Key No.) § 199; *Cent. Dig.* §§ 362–368.

<sup>9</sup> *Dicey, Parties*, p. 172. See, in affirmative, *Colly. Partn.* 467. See, in negative, *Lindl. Partn.* (2d Ed.) 479. Cf. *Bond v. Pittard*, 3 Mees. & W. 357. And see *KELL v. NAINBY*, 10 Barn. & C. 20; *Harrison v. Fitzhenry*, 3 Esp. 238; *Enix v. Hays*, 48 Iowa, 86; *Bishop v. Hall*, 9 Gray (Mass.) 430. See "*Partnership*," *Dec. Dig.* (Key No.) § 199; *Cent. Dig.* §§ 362–368.

- (3) Where the right to sue on the contract is by the terms or circumstances of it expressly restricted to the partner with whom it is made (p. 536).
- (b) In the following cases the action may be brought either in the name of all the partners, or in the name of the partner in whose name it was made:
  - (1) Where the contract is made with the partner personally, as well as with him on behalf of the firm (p. 538).
  - (2) Where the partner is the only known or ostensible principal; that is, where the firm occupies the position of an undisclosed principal (p. 538).
  - (3) Where the partner has paid away money of the firm under circumstances which give a right to recover it back (p. 538).
- (c) Dormant partners are proper, but not necessary, parties (p. 540).

Each partner is an agent of his copartners within the scope of the partnership business. Hence, he must sue alone on contracts made with the firm (his principals) in cases in which an action must be brought in the name of an agent. The question whether a partner may or must sue without joining his copartners is in reality nothing but the inquiry whether an agent must or may sue on a contract made with him on behalf of his principal.<sup>10</sup> Accordingly, where it expressly appears from the contract that it was entered into on behalf of a firm, an action thereon must be brought by all the members composing the firm at the time the contract is entered into,<sup>11</sup> excepting only

<sup>10</sup> Dicey, *Parties*, p. 153.

<sup>11</sup> *Badger v. Daenleke*, 56 Wis. 678, 14 N. W. 821; *Wilson v. Wallace*, 8 Serg. & R. (Pa.) 53; *Bruett & Co. v. F. O. Austin Drainage Excavator Co.* (C. C.) 174 Fed. 668; *Phillips v. Holmes* (Ala.) 51 South. 625; *Ingham Lumber Co. v. Ingersoll & Co.* (Ark.) 125 S. W. 139. See "*Partnership*," *Dec. Dig. (Key No.)* § 199; *Cent. Dig.* § 363.

dormant partners.<sup>12</sup> So, where the action is on an implied contract with the firm, all the partners must join as plaintiffs, whether the defendant knew he was dealing with the firm or not. Thus, if the funds of a firm are lent by one partner, he cannot alone maintain an action for its repayment by virtue of any implied contract with himself, for the promise to repay which is implied by law is a promise with the real lenders of the money, and must be sued upon by them.<sup>13</sup>

*When Partner must Sue Alone—Sealed Instruments*

Where a contract under seal is entered into with one partner only, he alone can sue upon it. If it is entered into with more than one, all those with whom it was expressly entered into must sue jointly, and no others can.<sup>14</sup>

*Same—Negotiable Instruments*

No person can claim upon a bill of exchange or promissory note except the parties named in the instrument. Hence, though the party named in such instrument is a partner, the action must be brought in his name alone, and not jointly in the name of himself and his copartners, who are not parties.<sup>15</sup> This exception appears to be of small

<sup>12</sup> See ante, p. 532, note 4; *Lebeck v. Shaftoe*, 2 Esp. 468. See "*Partnership*," *Dec. Dig. (Key No.)* § 199; *Cent. Dig.* § 366.

<sup>13</sup> *Colly. Partn.* p. 1012, note, citing *Garrett v. Handley*, 3 Barn. & C. 462; *Graham v. Robertson*, 2 Term R. 232; *Teed v. Elworthy*, 14 East, 210. In an action by partners on a contract made by defendant with one of plaintiffs only, plaintiffs need not prove that defendant understood that they were partners. *Philpott v. Bechtel*, 104 Mich. 79, 62 N. W. 174. See "*Partnership*," *Dec. Dig. (Key No.)* § 199; *Cent. Dig.* §§ 362-368.

<sup>14</sup> See *Dacey, Parties*, pp. 153, 134, 101; *Metcalf v. Rycroft*, 6 Maule & S. 75; *Colly. Partn.* p. 1010, note, citing note to *Cabell v. Vaughan*, 1 Saund. 291; *Scott v. Godwin*, 1 Bos. & P. 67. A partner, being a tenant in common with his copartner, may recover possession of the whole of the firm real estate, as against one holding the same without title. *Brady v. Kreuger*, 8 S. D. 464, 66 N. W. 1083, 59 Am. St. Rep. 771. See "*Partnership*," *Dec. Dig. (Key No.)* § 199; *Cent. Dig.* §§ 362, 363.

<sup>15</sup> *Dacey, Parties*, pp. 153, 134; *Bowden v. Howell*, 3 Man. & G. 638; *Driver v. Burton*, 17 Q. B. 989; *Mynderse v. Snook*, 53 Barb. (N. Y.) 234; *Id.*, 1 Lans. (N. Y.) 488. See "*Partnership*," *Dec. Dig. (Key No.)* § 199; *Cent. Dig.* §§ 362-368.

importance, since the right to sue on such instruments is assignable. If they be indorsed in blank, any persons holding them may sue upon them. Where a partner is named as a party to a negotiable instrument, he may indorse it to his firm, and thereupon an action may be maintained by all the partners jointly.<sup>16</sup>

*Same—Contract with Partner Alone*

It may be that, though a partner is acting for his firm, the person with whom he deals expressly refuses to contract with any other than the partner himself, or it may be manifest, from the circumstances of the case, that the contract was with the partner personally, and with him alone. In such a case, though the partner may have been, as a matter of fact, acting for his firm, and the firm as his principal may have rights against such partner, yet the firm has no rights against a person with whom the partner dealt, but who never contracted with the firm, and the partner, who is the only person with whom he did contract, is the only one who can sue him upon the contract.<sup>17</sup> Thus,

<sup>16</sup> See Bates, Partn. § 1017.

<sup>17</sup> Where the third person has clearly expressed his intention to deal with the agent as principal, or where he has dealt with the agent on terms of trust and confidence, or the nature of the contract is fiduciary, the undisclosed principal cannot claim the benefits of the contract. "Every man has a right to elect what parties he will deal with. \* \* \* And, as a man's right to refuse to enter into a contract is absolute, he is not obliged to submit the validity of his reasons to a court or jury." *Winchester v. Howard*, 97 Mass. 303, 93 Am. Dec. 93. The intention to deal only with the agent may be found in the recitals of the written contract, *Humble v. Hunter*, 12 Q. B. 310; or the negotiations attending an oral one, *Winchester v. Howard*, supra. In the first case, the question would be one of construction for the court; in the latter, of fact for the jury. The intention may be further inferred from the nature of the contract, as where it is fiduciary, or for personal skill or service. *Pol. Cont.* (6th Ed.) p. 67; *Eggleston v. Boardman*, 37 Mich. 14. But in the latter case it would seem that, if the agent has personally discharged the trust or performed the service, his undisclosed principal may recover the compensation. *Warder v. White*, 14 Ill. App. 50, citing *Grojan v. Wade*, 2 Starkie, 443; *Huff. Ag.* § 132. Where a landlord, knowing that his store is wanted by a firm of four persons in which to carry on their business, makes a lease to one of them, and two of the others sign as sureties, and the other is in no

where a contract was made with one of several partners in his individual capacity, and he at the time declared that he alone was interested in it, it was held that the other partners, although they might be interested in it, could not sue upon it;<sup>18</sup> for, though the partner might, as regards his fellow partners, act as their agent, yet "if one partner makes a contract in his individual capacity, and the other partners are willing to take the benefit of it, they must be content to do so according to the mode in which the contract was made."<sup>19</sup> So, if one contracts with an agent, in consideration of the known personal capabilities of the agent, he cannot be made liable to the principal for whom the agent was acting.<sup>20</sup>

This exception contains the principle which governs all the exceptional cases in which a partner must sue alone for a breach of contract. The reason of this peculiarity always is that the other contracting party has contracted with the partner alone. That the contract was made with him alone may appear by the form of the contract itself (e. g. where it is by deed), or it may be proved from the circumstances of the case. But the reason why the partner alone can sue will be found to be in every instance the same, viz. that, as

way a party to the lease, only the one named as lessee can sue for breach of the lease. *Burwitz v. Jeffers*, 103 Mich. 512, 61 N. W. 784. See, also, *Covington v. Sloan* (Tex. Civ. App.) 124 S. W. 690; *Davidge v. Guardian Trust Co. of New York*, 136 App. Div. 78, 120 N. Y. Supp. 628. See "*Partnership*," *Dec. Dig. (Key No.)* § 199; *Cent. Dig.* §§ 362-368.

<sup>18</sup> *Lucas v. Delacour*, 1 Maule & S. 249. "Where, in a written instrument, the agent has represented himself in express terms or recitals as the real and only principal, the undisclosed principal cannot maintain an action in his own name, since parol evidence would be inadmissible to vary the express terms and recitals of the written instrument. *Humble v. Hunter*, 12 Q. B. 310; *Schmaltz v. Avery*, 16 Q. B. 655; *Darrow v. H. R. Horne Produce Co.* (C. C.) 57 Fed. 463." *Huff. Ag.* § 133. See "*Partnership*," *Dec. Dig. (Key No.)* § 199; *Cent. Dig.* §§ 362-368.

<sup>19</sup> *Id.*

<sup>20</sup> *Robson v. Drummond*, 2 Barn. & Adol. 303. See "*Principal and Agent*," *Dec. Dig. (Key No.)* §§ 140, 141, 143, 183; *Cent. Dig.* §§ 496-498, 502-512, 692.

between him and the other party to the contract, he has contracted, not as an agent, but as sole principal.<sup>21</sup>

*When Partner may Sue Either Alone or Jointly with Copartners*

"Where an agent makes a contract, stating who his principal is, the principal, and not the agent, is the person generally the party to the contract, if the agent have the authority he alleges. But, on the other hand, an agent may, and often does, make himself personally a party to the contract, if the form of the contract be such as to amount to saying, 'Although I am an agent only, nevertheless I contract for myself;' and, although the principal may in some cases take advantage of such a contract, the agent, being the contracting party is clearly liable, and can therefore sue upon it."<sup>22</sup>

*Same—Firm as an Undisclosed Principal*

"It is a well-established rule of law that, where a contract not under seal is made by an agent in his own name for an undisclosed principal, either the agent or the principal may sue on it; the defendant in the latter case being entitled to be placed in the same situation at the time of the disclosure of the real principal as if the agent had been the contracting party. The rule is most frequently acted upon in sales by factors, agents, or partners, in which case either the nominal or the real plaintiff may sue; but it may be equally applied to other cases."<sup>23</sup>

*Same—Recovery of Money Paid under Fraud or Mistake*

"If an agent pays money for his principal, by mistake or otherwise, which he ought not to have paid, the agent, as well as the principal, may maintain an action to recover it back."<sup>24</sup> There is no reason why this rule should not ap-

<sup>21</sup> See Dicey, *Parties*, p. 136. See, further, chapter III, §§ 41-42, pp. 118-126.

<sup>22</sup> *Fisher v. Marsh*, 34 Law J. Q. B. 178, per Blackburn, J. Cf. *Hilliker v. Loop*, 5 Vt. 116, 26 Am. Dec. 286. See "*Partnership*," *Dec. Dig. (Key No.)* § 199; *Cent. Dig.* §§ 361-368.

<sup>23</sup> *Sims v. Bond*, 5 Barn. & Adol. 393, per curiam. See "*Partnership*," *Dec. Dig. (Key No.)* § 199; *Cent. Dig.* §§ 361-368.

<sup>24</sup> *Story, Ag.* § 398.

ply to payments made by one partner for his firm, and it has been held that where a partner enters into a contract under seal for the payment of money, and the money is paid out of funds of the firm, and it then appears that the contract was invalid on the ground of fraud, the partner who entered into the covenant may sue alone for the recovery back of the money.<sup>25</sup>

*Same—Reason and Limitation of Rule*

The right to bring the suit either in the name of the partner with whom the contract was made, or in the name of all the partners jointly, rests on the ground that, while the partners collectively—i. e. the firm—have the ordinary right of every principal to sue for the breach of a contract made on their behalf, the agent has been dealt with as a party, though not the only party, to the contract, or to the transaction which gives a right of action as if there had been a breach of contract; e. g. where the partner sues for money of the firm which he was wrongfully induced to pay.<sup>26</sup> The choice or election of suing either in the name of the agent partner, or all the partners jointly, is subject to certain limitations, the object of which is to prevent this right of election from being so exercised as to work injustice to any of the persons concerned in the contract.

First. The partner's right to sue is subject to the firm's right to interpose. Wherever the principal, as well as the agent, has a right to maintain a suit upon any contract made by the latter, he may generally supersede the right of the agent to sue by suing in his own name.<sup>27</sup> So, the principal may, by his own intervention, intercept or suspend or extinguish the rights of the agent under the contract, as if he makes other arrangements with the other contracting party, or waives his claims under it, or receives payment thereof, or in any other manner discharges it. This, indeed, results from the general principle of law that every man

<sup>25</sup> *Lefevre v. Boyle*, 3 Barn. & Adol. 877. See "Partnership," *Dec. Dig. (Key No.)* § 199; *Cent. Dig.* §§ 362-368.

<sup>26</sup> *Dacey, Parties*, p. 140.

<sup>27</sup> *Sadler v. Leigh*, 4 Camp. 195. See "Partnership," *Dec. Dig. (Key No.)* § 199; *Cent. Dig.* §§ 362-368.

may waive or extinguish rights the benefit whereof exclusively belongs to himself, and that whatever rights are acquired by an agent are acquired for his principal.<sup>28</sup>

Secondly. Where an undisclosed principal sues on a contract made by his agent, "the defendant is entitled to be placed in the same situation at the time of the disclosure of the real principal as if the agent had been the contracting party";<sup>29</sup> that is, the defendant may avail himself of all defenses which would have been available to him against the agent at the time of the disclosure, had that agent been really a principal.<sup>30</sup>

#### *Dormant and Nominal Partners*

When the contract is made in the name of one partner, but under circumstances entitling the firm—i. e. all the partners jointly—to sue, the same considerations as to dormant and nominal partners apply as in the case of contracts made in the firm name.<sup>31</sup>

### SAME—CLAIMS ARISING EX DELICTO

178. In an action ex delicto to recover damages suffered by partners jointly, i. e., damages to the firm, all the partners must join as plaintiffs.

Where the same act that causes a damage to all the partners jointly as a firm also causes a separate and personal damage to one or more of the partners, two or more causes of action exist. The joint damage must be recovered in a joint action by all the partners, and the individual damage must be recovered in separate actions by each.

With respect to actions by partners not founded on any

<sup>28</sup> Story, Ag. § 403.

<sup>29</sup> Sims v. Bond, 5 Barn. & Adol. 393, per curiam. See "*Principal and Agent*," Dec. Dig. (Key No.) §§ 138-146, 185; Cent. Dig. §§ 495-527, 704-706.

<sup>30</sup> Thomson v. Davenport, 9 Barn. & C. 78, 2 Smith, Lead. Cas. (7th Ed.) 359. See "*Principal and Agent*," Dec. Dig. (Key No.) § 185; Cent. Dig. §§ 704-706.

<sup>31</sup> See ante, p. 532.

breach of contract, or of quasi contract, but on some tort, the general principle is that, where a joint damage accrues to several persons from a tort, they ought all to join in an action founded upon it,<sup>32</sup> while, on the other hand, several persons ought not to join in an action *ex delicto*, unless they can show a joint damage.<sup>33</sup>

These doctrines are well illustrated by actions for libel. A libel on a firm can be made the subject of an action by the firm.<sup>34</sup> If the libel reflects directly on one partner, and through him on the firm, two actions will lie, viz. one by the party libeled, and the other by him and his copartners; but the damage in the first action must not appear to be joint, nor must that in the second appear to be confined to the libeled partner only.<sup>35</sup> If one partner is libeled, and the firm cannot be shown to have been damnified, an action for the libel should be brought in the name of the individual partner aggrieved, and not by the firm;<sup>36</sup> and he

<sup>32</sup> See 1 Wm. Saund. 291m; *Addison v. Overend*, 6 Term R. 766; *Sedgworth v. Overend*, 7 Term R. 279. One partner cannot maintain action for conversion of firm property. *Doll v. Hennessy Mercantile Co.*, 33 Mont. 80, 81 Pac. 625. See "*Partnership*," *Dec. Dig. (Key No.)* § 199; *Cent. Dig.* §§ 362-368.

<sup>33</sup> 2 Wm. Saund. 116a; *Noonan v. Orton*, 32 Wis. 106; *Donnell v. Jones*, 13 Ala. 490, 48 Am. Dec. 59; *Medbury v. Watson*, 6 Metc. (Mass.) 246, 39 Am. Dec. 726; *Robinson v. Mansfield*, 13 Pick. (Mass.) 139; *Trott v. Irish*, 1 Allen (Mass.) 481. Cf. *Duffy v. Gray*, 52 Mo. 528. See "*Partnership*," *Dec. Dig. (Key No.)* § 199; *Cent. Dig.* §§ 362-368.

<sup>34</sup> See *Cooke v. Batchelor*, 3 Bos. & P. 150; *FORSTER v. LAWSON*, 3 Bing. 452; *Williams v. Beaumont*, 10 Bing. 260; *Metropolitan Saloon Omnibus Co. v. Hawkins*, 4 Hurl. & N. 87; *Taylor v. Church*, 1 E. D. Smith (N. Y.) 279; *Duffy v. Gray*, 52 Mo. 528; *Donnell v. Jones*, 13 Ala. 490, 48 Am. Dec. 59. See "*Libel and Slander*," *Dec. Dig. (Key No.)* § 73; *Cent. Dig.* § 174.

<sup>35</sup> See *Harrison v. Bevington*, 8 Car. & P. 708; *FORSTER v. LAWSON*, 3 Bing. 452; 2 Wm. Saund. 117b; *Haythorn v. Lawson*, 3 Car. & P. 196; *Duffy v. Gray*, 52 Mo. 528; *Donnell v. Jones*, 13 Ala. 490, 48 Am. Dec. 59; *Noonan v. Orton*, 32 Wis. 106; *Davis v. Ruff*, Cheves (S. C.) 17, 34 Am. Dec. 584; *Weltershausen v. Croatian Print. & Pub. Co. (C. C.)* 151 Fed. 947. See "*Libel and Slander*," *Dec. Dig. (Key No.)* § 73; *Cent. Dig.* § 174.

<sup>36</sup> *Solomons v. Medex*, 1 Starkie, 191. Where the firm is libeled, each partner may sue to recover damages thus inflicted upon his interest. *Tobin v. Alfred M. Best Co.*, 120 App. Div. 387, 105 N. Y.

may sue alone, although the libel more particularly affects him in the way of his business.<sup>37</sup> Moreover, a general statement not clearly pointing to any particular person, but libelous as to an entire class, may be treated by any individual of that class, who can show that he was in fact intended, as a libel on himself; and this principle is as applicable to libels affecting a firm as to those affecting single individuals.<sup>38</sup>

### PARTIES TO ACTIONS AGAINST THE FIRM

179. This subject will be treated under the following heads:

- (a) Liabilities arising ex contractu (infra).
- (b) Liabilities arising ex delicto (p. 549).

### SAME—LIABILITIES ARISING EX CONTRACTU

180. All persons who are partners at the time when a contract is made by or on behalf of the firm must be joined as defendants in an action for its breach, except

#### EXCEPTIONS:

- (a) Dormant partners are proper, but not necessary, parties (p. 544).
- (b) Nominal partners are not necessary parties, but are proper parties in cases where they have been held out under such circumstances as to render them liable as actual partners (p. 545).
- (c) Where the contract has been made in the name of one partner, he alone can be sued in the following cases:
  - (1) Where the contract is under seal (p. 546).

Supp. 294. See "*Libel and Slander*," Dec. Dig. (Key No.) § 73; Cent. Dig. § 174.

<sup>37</sup> *Harrison v. Bevington*, 8 Car. & P. 708; *Robinson v. Marchant*, 7 Q. B. 918. See "*Libel and Slander*," Dec. Dig. (Key No.) § 73; Cent. Dig. § 174.

<sup>38</sup> *Le Fanu v. Malcolmson*, 1 H. L. Cas. 637. See "*Libel and Slander*," Dec. Dig. (Key No.) § 21; Cent. Dig. § 103.

- (2) Where the contract is a negotiable instrument (p. 546).
- (3) Where credit was given exclusively to the partner in whose name the contract was made (p. 547).
- (d) Where the contract has been made in the name of one partner, an action thereon may be maintained either against such partner alone or against all the partners jointly in the following cases:
  - (1) Where the partner contracted individually, as well as on behalf of the firm (p. 547).
  - (2) Where the contract does not show that it was entered into on behalf of the firm; that is, where the firm occupies the position of undisclosed principal (p. 548).

As has been seen, contracts with a firm are simply contracts with all the partners jointly. All persons who are jointly liable on a contract must, as a general rule, be joined in an action thereon. Where a contract, therefore, is made by or on behalf of a firm, as where it is made in the firm name, all the persons who were partners at the time it was made must, as a general rule be joined as defendants. The partnership name is merely a symbol to designate all the partners, without naming them, and to show that the contract was a partnership transaction. But, even where the contract was entered into by an agent, or by one partner, if it appears from the contract that it was a contract with the firm, then all the partners must be joined, because they are joint principals.<sup>80</sup> It is important to bear in mind,

<sup>80</sup> *Hoskins v. Velasco Nat. Bank*, 48 Tex. Civ. App. 246, 107 S. W. 598; *Moses v. Krauss*, 90 Miss. 618, 44 South. 162; *Leola Lumber Co v. Bozarth*, 91 Ark. 10, 120 S. W. 152; *Page v. Brant*, 18 Ill. 37; *Pettis v. Atkins*, 60 Ill. 454; *Hollingshead v. Curtis*, 14 N. J. Law, 402; *Simonds v. Speed*, 6 Rich. Law (S. C.) 390; *Lippincott v. Shaw Carriage Co.* (C. C.) 25 Fed. 577. Nonjoinder of all the partners can be taken advantage of by plea in abatement. *Sinsheimer v. William Skinner Mfg. Co.*, 54 Ill. App. 151; *Puschel v. Hoover*, 16 Ill. 340; *Ives v. Muhlenburg*, 135 Ill. App. 517; *Mershon v. Hobensack*, 22 N. J. Law, 372; *Smith v. Cooke*, 31 Md. 174, 100

however, that legislation in many states has greatly modified joint obligations, both as to their nature and the procedure for their enforcement. Attention has already been called to this legislation.<sup>40</sup> An extended examination of such statutes cannot be made within the limits of the present work. Some of the more important characteristics are mentioned in the note, but the enumeration is not exhaustive. The reader should consult the statutes and the decisions of the particular jurisdiction in question.<sup>41</sup>

#### *Dormant Partners*

It has been seen that dormant and secret partners are liable on all contracts entered into on behalf of the firm to which they belong; and, whether such a contract is written or parol, express or implied, it is clear that they may be sued upon it. But it is perfectly proper not to join them.

Am. Dec. 58. In an action against the members of the firm of R. & Co. on a contract made in the firm name by defendant R., it appeared that when the contract was made the other defendants were not R.'s partners, and who were his partners then did not appear. Held, that the complaint must be dismissed as to all the defendants, including R. *Hand v. Rogers*, 14 Misc. Rep. 248, 35 N. Y. Supp. 712, affirmed 25 Civ. Proc. R. 254, 16 Misc. Rep. 17, 37 N. Y. Supp. 657. Where all the partners are sued on a partnership debt, and the action is barred as to one, he not having been made a party at the commencement of the action, no recovery can be had against the others. *Fish v. Farwell*, 54 Ill. App. 457. In an action against the members of a voluntary association, upon a contract, the recovery must be against all or none. *Pettis v. Atkins*, 60 Ill. 454. In *Kent v. Holliday*, 17 Md. 387, it was held that in an action on a partnership contract all those who were partners at the time of the contract ought to be joined as defendants, for such a contract is a joint contract, and that a declaration which discloses that there was a joint contractor at the time the contract sued on is made, and does not aver he was dead, or a nonresident of the county, or account in any other way for his not being joined in the action, is bad on demurrer. See "*Partnership*," *Dec. Dig. (Key No.)* § 290; *Cent. Dig.* § 369.

<sup>40</sup> See ante, chapter IV, § 70, p. 220.

<sup>41</sup> In some states it is provided that where two or more persons are bound by contract, judgment, decree, or statute, whether jointly only, or jointly or severally, or severally only, the action thereon may, at plaintiff's option, be brought against any or all of them. *California*: Code Civ. Proc. 1909, §§ 414, 994. *Iowa*: Code 1897, §

A person who holds himself out to another as the only person with whom that other is dealing cannot afterwards say that such other was also dealing with somebody else. In short, dormant partners are proper, but not necessary, parties.<sup>43</sup>

### *Nominal Partners*

Nominal partners are not actual partners. As has been seen, their liability on firm contracts rests on estoppel, and not on the fact that they are actual parties to it.<sup>44</sup> A plaintiff, in an action on a firm contract, may therefore waive the benefit of the estoppel, and sue only the actual partners, or he may join the nominal partner, as he sees fit. In other words, nominal partners are not necessary parties, but are proper parties, in cases where they have been held out under such circumstances as to render them liable as actual partners.<sup>44</sup>

3465. *Indiana*: Burns' Ann. St. 1908, §§ 324-327. *Minnesota*: Gen. St. 1905, §§ 4282, 4283. *Missouri*: Ann. St. 1906, § 892. *New Mexico*: Comp. Laws 1897, §§ 2894, 2895. *Tennessee*: Shannon's Code 1896, §§ 4484-4487. *South Carolina*: Code Civ. Proc. 1902, § 157.

An action or judgment against one or more persons severally bound is not in several states a bar to proceedings against the others. *Iowa*: Code 1897, § 3465. *Indiana*: Burns' Ann. St. 1908, §§ 593-596. *Kansas*: Gen. St. 1905, § 5336. *Kentucky*: Civ. Code Prac. 1906, §§ 27, 373. *Montana*: Rev. Codes 1907, § 7129. *New Mexico*: Comp. Laws 1897, §§ 2894, 2895. *Tennessee*: Shannon's Code 1896, § 4487. *Vermont*: St. 1894, § 1182.

<sup>42</sup> *New York Dry Dock Co. v. Treadwell*, 19 Wend. (N. Y.) 525; *Leslie v. Wiley*, 47 N. Y. 648; *Scott v. Conway*, 58 N. Y. 619; *North v. Bloss*, 30 N. Y. 374; *Wright v. Herrick*, 125 Mass. 154; *Page v. Brant*, 18 Ill. 37; *COX v. HICKMAN*, 8 H. L. Cas. 268, *Gilmore, Cas. Partnership*, 31; *Cleveland v. Woodward*, 15 Vt. 302, 40 Am. Dec. 682; *De Mautort v. Saunders*, 1 Barn. & Adol. 398; *Chase v. Deming*, 42 N. H. 274; *Allen v. Fleck* (Tex. Civ. App.) 118 S. W. 176. *Dacey, Parties*, p. 368. See "*Partnership*," *Dec. Dig. (Key No.)* § 200; *Cent. Dig.* § 370.

<sup>43</sup> See ante, chapter I, § 21, p. 61.

<sup>44</sup> *Hatch v. Wood*, 43 N. H. 633; *SCARF v. JARDINE*, 7 App. Cas. 345. "But, where the nominal partner has never been known as such to a particular person, it would rather appear (see, contra, *Young v. Axtell*, cited in *WAUGH v. CARVER*, 2 H. Bl. 235, 1 Smith, Lead. Cas. [6th Ed.] 846, *Gilmore, Cas. Partnership*, 19, where it is stated by Lord Mansfield 'that as the defendant had suffered

*When Agent Partner must be Sued Alone—Deeds*

Where a partner contracts by deed in his own name, he alone can be sued thereon. This is a mere application of the rule that the person to be sued on a contract by deed is the person with whom the contract is expressed by the deed to be made.<sup>45</sup>

*Same—Negotiable Instruments*

Where a partner draws, indorses, or accepts a bill of exchange in his own name, he alone can be sued thereon. Though "the rule of law, as to simple contracts in writing other than bills and notes, is that parol evidence is admissible to charge unnamed principals, \* \* \* but is inadmissible for the purpose of discharging the agent who signs, as if he were principal, in his own name, \* \* \* yet it is conceived that the law as to negotiable instruments is

her name to used in the business, and held herself out as a partner, she was certainly liable, though the plaintiff did not at her time of dealing know that she was a partner, or that her name was used.' Id. 847) that such person cannot join him in an action against the firm, for the rule which imposes on a nominal partner the responsibilities of a real one is framed in order to prevent those persons from being defrauded or deceived who may deal with the firm. But, where the person dealing with the firm has never heard of him as a component part of it, that reason no longer applies. *WAUGH v. CARVER*, 1 Smith, Lead. Cas. (6th Ed.) 860, Gilmore, Cas. Partnership, 19. A plaintiff's right to sue a nominal partner depends upon its being proved 'that the defendant held himself out, not to the world, for that is a loose expression, but to the plaintiff himself, or under such circumstances of publicity as to satisfy a jury that the plaintiff knew of it, and believed him to be a partner.' *Dickinson v. Valpy*, 10 Barn. & C. 140, per Parke, J. And compare *Shott v. Strealfield*, 1 Moody & R. 9; *ALDERSON v. POPES*, 1 Camp. 404, note. The rule as to a nominal partner's liability to be sued may, if this view of his position be correct, be thus summed up: He is simply an apparent partner, and may be sued by any person to whom he appears to be a partner, but cannot be sued by any person to whom he has not appeared to be a partner." Dicey, Partles, p. 270. See chapter I, § 21, p. 61. See "*Partnership*," *Dec. Dig. (Key No.)* § 200; *Cent. Dig.* § 369.

<sup>45</sup> Dicey, Partles, pp. 271, 229, rule 48; *Eastwood v. Bain*, 3 Hurl. & N. 738; *Bottomley v. Nuttall*, 5 C. B. (N. S.) 122, 28 Law J. C. P. 110; *Appleton v. Binks*, 5 East, 147, 148; *Firemen's Ins. Co. v. Floss*, 67 Md. 403, 10 Atl. 139, 1 Am. St. Rep. 398. See "*Partnership*," *Dec. Dig. (Key No.)* § 200; *Cent. Dig.* § 369.

different in one respect, to wit, that where the principal's name does not appear he is not liable on a bill or note as a party to the instrument."<sup>46</sup>

*Same—Credit Given Exclusively to Agent Partner*

It is possible that a third party, with whom a partner contracts as an agent, on behalf of his firm as a known principal, may be willing to give credit to the agent partner, and not be willing to give credit to the firm or principal. A person so dealing with an agent cannot afterwards sue the principal.<sup>47</sup> "If the principal be known to the seller at the time when he makes the contract, and he, with the full knowledge of the principal, chooses to debit the agent, he thereby makes his election, and cannot afterwards charge the principal."<sup>48</sup>

*When Partner may be Sued Alone or Jointly with Copartners*

Where a partner contracts individually, as well as on behalf of his firm, the action may be brought either against him alone or against all the partners jointly. "A person who is acting for another, and known by him with whom he deals to be so acting, may and will be personally liable if he contracts as a principal, and that whether he contracts by word of mouth or in writing. The difference is that, if the contract is by word of mouth, it is not possible to say, from the agent using the words 'I' and 'me'; whereas, if the contract is in writing, signed in his own name, and speaking of himself as contracting, the natural meaning of the words is that he binds himself personally, and, accordingly, he is taken to do so. \* \* \* It is well settled that an agent is responsible, though known by the other party to be an agent, if, by the terms of the contract, he makes

<sup>46</sup> Byles, Bills (8th Ed.) 34, 35. *Pentz v. Stanton*, 10 Wend. (N. Y.) 271, 25 Am. Dec. 558; *Leadbitter v. Farrow*, 5 Maule & S. 345. Cf. *Lindus v. Bradwell*, 5 C. B. 583, 17 Law J. C. P. 121. See "*Partnership*," *Dec. Dig. (Key No.)* § 200; *Cent. Dig.* § 369.

<sup>47</sup> *Addison v. Gandasequi*, 4 Taunt. 573, 2 Smith, Lead. Cas. (8th Ed.) 392. See "*Partnership*," *Dec. Dig. (Key No.)* § 200; *Cent. Dig.* § 369.

<sup>48</sup> *Thomson v. Davenport*, 9 Barn. & C. 78, 2 Smith, Lead. Cas. (8th Ed.) 398. See "*Partnership*," *Dec. Dig. (Key No.)* § 200; *Cent. Dig.* § 369.

himself the contracting party."<sup>49</sup> If the contract is by parol, it is merely a question of evidence whether the partner intended to bind himself personally. If the contract is in writing, it is a question of interpretation. Thus, where an agent contracts in his own name, without mentioning his principal, though the fact of his being an agent is known to the other party, he is personally liable.<sup>50</sup> The fact, however, that an agent is clearly liable on a written contract, does not free his principal from liability; for, though a person who appears to be liable on the face of a written contract cannot give evidence to show that he is not liable, since to do this would be to contradict the written contract, there is nothing to prevent the production of evidence that a person who is not liable on the face of a contract is in reality chargeable under it.<sup>51</sup>

*Same—Firm as Undisclosed Principal*

Where a partner contracts in his own name, but in reality for his firm, which occupies the position of an undisclosed principal, either the partner so contracting or the firm—i. e., all the partners jointly—may be sued.<sup>52</sup> This exception might be included under the last.

<sup>49</sup> *Williamson v. Barton*, 31 Law J. Exch. 174, per Bramwell, B. See, also, Dicey, *Parties*, 255; Story, *Ag.* § 269; *Higgins v. Senior*, 8 Mees. & W. 834; *Parker v. Winlow*, 7 El. & Bl. 942. Cf. *Fisher v. Marsh*, 34 Law J. Q. B. 177, 6 Best & S. 411. See "*Partnership*," *Dec. Dig.* (Key No.) § 200; *Cent. Dig.* § 369.

<sup>50</sup> *Higgins v. Senior*, 8 Mees. & W. 834. See "*Principal and Agent*," *Dec. Dig.* (Key No.) § 136; *Cent. Dig.* §§ 476-491.

<sup>51</sup> Dicey, *Parties*, p. 256; *Paterson v. Gandasequi*, 15 East, 62, 2 Smith, Lead. Cas. (6th Ed.) 613. See "*Principal and Agent*," *Dec. Dig.* (Key No.) §§ 130-136; *Cent. Dig.* §§ 458-491, 500.

<sup>52</sup> See Dicey, *Parties*, 256; *Paterson v. Gandasequi*, 15 East, 62, 2 Smith, Lead. Cas. (6th Ed.) 613. Where one assumes to act as agent for a single member of a firm in the sale of partnership property, the receipt by the assumed principal of the money received on the sale is a ratification of the agency, and an adoption of the means by which it was obtained. And, when the purchaser was ignorant of the existence of the partnership, the other partners need not be joined in an action to recover back the money paid, for fraud on the part of the agent, or for mistake. The declared principal becomes liable immediately upon the receipt of the money, and his subsequent division of it among persons who were strangers in the

## SAME—LIABILITIES ARISING EX DELICTO

181. One or any or all of the partners in a firm may be sued separately or jointly for a wrong committed by the firm.

*Actions of Tort against Partners*

It is not every tort which, though committed by several persons acting together, is legally imputable to them all jointly;<sup>53</sup> but, supposing a tort to be imputable to a firm, an action in respect of it may be brought against all or any of the partners. If some of them only are sued, they cannot insist upon the other partners being joined as defendants;<sup>54</sup> and this rule applies even where the tort in question is committed by an agent or servant of the firm, and not otherwise by the firm itself.<sup>55</sup> But there is a distinction between ordinary actions of tort and those which are brought against persons in respect of their common interest in land; for all joint tenants or tenants in common ought to be joined in an action for an injury arising from the state of their land, and this rule applies to partners as well as to persons who are not partners.<sup>56</sup>

transaction to the plaintiff cannot affect his liability. *Leslie v. Willey*, 47 N. Y. 648. See "*Partnership*," *Dec. Dig. (Key No.)* § 200; *Cent. Dig.* § 369.

<sup>53</sup> See *Hale, Torts*, p. 167.

<sup>54</sup> *Sutton v. Clarke*, 6 Taunt. 29; *Maxwell v. Martin*, 130 App. Div. 80, 114 N. Y. Supp. 349; *Hale, Torts*, p. 123; *Lindl. Partn.* p. 283. See chapter IV, § 75, ante, p. 236. See "*Partnership*," *Dec. Dig. (Key No.)* § 200; *Cent. Dig.* § 369.

<sup>55</sup> *Mitchell v. Tarbutt*, 5 Term R. 649; *Ansell v. Waterhouse*, 6 Maule & S. 385; *Wood v. Luscomb*, 23 Wis. 287; *Howe v. Shaw*, 56 Me. 291. See "*Partnership*," *Dec. Dig. (Key No.)* § 200; *Cent. Dig.* § 369.

<sup>56</sup> *Lindl. Partn.* 283; *Mitchell v. Tarbutt*, 5 Term R. 649. See "*Partnership*," *Dec. Dig. (Key No.)* § 200; *Cent. Dig.* § 369.

### EFFECT OF CHANGES IN FIRM

182. Changes in the membership of a firm may arise by

- (a) The admission of a new member (*infra*).
- (b) The retirement of an old member (p. 553).
- (c) The death of a member (p. 556).
- (d) The bankruptcy or insolvency of a member (p. 558).

### SAME—ADMISSION OF NEW MEMBER

183. Where a new member has been taken into a firm, he cannot join as plaintiff in actions on claims due the old firm, except

#### EXCEPTIONS:

- (a) Where the claim has been assigned to the new firm (p. 551).
- (b) Where, by consent of all the parties, the new firm is substituted for the old as the obligee (p. 551).

184. Where a new member has been taken into a firm, he cannot be joined as a defendant in an action on a liability of the old firm, except

#### EXCEPTIONS:

- (a) Where, by consent of all parties, the new firm is substituted as the obligor (p. 552).
- (b) Where the incoming partner has become liable to creditors by assuming debts of the old firm, he may be joined or sued separately, according as his liability is joint or several <sup>57</sup> (p. 552).

185. Where the circumstances are not such that the new partner can sue or be sued, as the case may be, the action must be brought by or against the partners of the old firm, precisely as though no change had occurred.

<sup>57</sup> See chapter IV, §§ 76-78, *ante*, p. 240, where the commencement and duration of firm liability is considered.

The admission of a new member into a firm, as has been repeatedly said, operates as the formation of a new firm, and the dissolution of the old one. In other words, *prima facie*, the new partner is admitted for the future, and not for the past. The claims due the old firm belong to the members of the old firm, and are to be enforced by them. Similarly, a new member cannot be sued on a liability of the old firm. The liabilities, like the claims of the old firm, belong to the old members. There are, however, certain exceptions or apparent exceptions to these rules; and, under certain circumstances, the incoming partner may sue or be sued as the case may be. But, where the circumstances are not such that the new partner can sue or be sued, the action must be brought by or against the partners of the old firm, precisely as though no change had occurred.<sup>58</sup>

*Exceptions—When New Member may Join as Plaintiff*

The first exception to the rule that a new member cannot sue on a claim due the old firm is where there has been an assignment of such claims by the old firm to the new. Assignees of choses in action are now almost universally allowed to sue thereon in their own names.<sup>59</sup>

The second exception is where, by consent of all the parties interested, the new firm is substituted for the old as the obligee. This exception differs from the first as a novation differs from an assignment, viz. by the consent of the creditor, the discharge of the old obligation, and the creation of a new one. In such a case the new member may of

<sup>58</sup> Lindl. Partn. p. 286; Wilsford v. Wood, 1 Esp. 183; Vere v. Ashby, 10 Barn. & C. 288; Young v. Hunter, 4 Taunt. 582; Hatchett v. Blanton, 72 Ala. 423; Ringo v. Wing, 49 Ark. 457, 5 S. W. 787; Bracken v. Dillon, 64 Ga. 243, 37 Am. Rep. 70. An incoming partner is not liable on a written agreement of employment for more than a year, made before his entry into the firm, and signed in the firm name only. HUGHES v. GROSS, 166 Mass. 61, 43 N. E. 1031, 32 L. R. A. 620, 55 Am. St. Rep. 375. See "Partnership," Dec. Dig. (Key No.) §§ 234, 238, 242; Cent. Dig. §§ 482½, 483, 491, 492, 503.

<sup>59</sup> Viles v. Bangs, 36 Wis. 131; Walker v. Steel, 9 Colo. 388, 12 Pac. 423. For cases illustrating the common-law rule see Howell v. Reynolds, 12 Ala. 128; Molen v. Orr, 44 Ark. 486. See "Partnership," Dec. Dig. (Key No.) §§ 234, 242; Cent. Dig. §§ 482½, 483, 503.

course join, but the exception is only an apparent one, for the action is on the obligation to the new firm, and not on the obligation to the old one.<sup>60</sup>

*Same—When New Member may be Made a Defendant—  
Assumption of Debts*

The first exception to the rule that a new member cannot be sued on an obligation of the old firm is where, by consent of all the parties interested, the new firm is substituted as the obligor. This exception to the rule as to defendants corresponds to the similar exception as to plaintiffs, just considered. It is only an apparent exception, for the action is really on an obligation of the new firm, the obligation of the old firm being discharged in consideration of the assumption of liability by the new firm.

There is a second exception in some jurisdictions to the rule under consideration. As has been seen, a number of courts hold that an incoming partner, by assuming debts of the old firm, may become liable to creditors, although he

<sup>60</sup> See ante, chapter IV, §§ 77-78, pp. 242-257. "In all these cases, founded on a new and original consideration of benefit to the defendant or harm to the plaintiff moving to the party making the promise either from the plaintiff or original debtor, the subsisting liability of the original debtor is no objection to recovery." *Farley v. Cleveland*, 4 Cow. (N. Y.) 439, 15 Am. Dec. 387, approved in *Holle v. Bailey*, 58 Wis. 434, 17 N. W. 322. The new member having covenanted, as between himself and the retiring partner, to pay the latter's share of the partnership liabilities, and the new firm having made payments on the plaintiff's claim, and the retiring partner having assigned to plaintiff all claim he might have against such new member on the agreement between them, and the plaintiff having thereupon brought this suit against the new firm, these facts, appearing in evidence, would be sufficient to fairly warrant a jury in finding that plaintiff had accepted the new firm as her debtor in place of the old, and had consented to the substitution which the several partners among themselves had agreed upon. Creditors of a dissolved firm, who take the paper of the succeeding firm, release the retiring members. *SMITH v. SHELDON*, 35 Mich. 42, 24 Am. Rep. 529, *Gilmore, Cas. Partnership*, 332; *Regester v. Dodge*, 19 Blatchf. 79, 6 Fed. 6; *Dodd v. Dreyfus*, 57 How. Prac. (N. Y.) 319. But such subrogation of the new firm must be accepted by the creditor, to release the retiring member. *Hayes v. Knox*, 41 Mich. 529, 2 N. W. 670; *Osborn v. Osborn*, 36 Mich. 48. See "*Partnership*," *Dec. Dig. (Key No.)* §§ 234, 242; *Cent. Dig.* §§ 482½, 483, 503.

has not contracted with them, and although the old firm has not been released. In these jurisdictions, where the incoming partner has become liable to creditors by assuming debts of the old firm, he may be joined or sued separately, according as his liability is joint or several.<sup>61</sup>

### SAME—RETIREMENT OF OLD MEMBER

**186.** A retired partner must join as a plaintiff in actions on claims due the old firm whenever such joinder would have been necessary had he not retired, except

#### EXCEPTIONS:

- (a) Where the claim has been assigned to the new firm.
- (b) Where, by consent of all the parties, the new firm is substituted for the old as obligee.

**187.** A retired partner must be joined as a defendant in an action on a liability of the old firm whenever such joinder would have been necessary had he not retired, except

#### EXCEPTIONS:

- (a) Where, by consent of all the parties, the new firm is substituted for the old as the obligor.
- (b) Where the new firm has become liable to creditors by assuming debts of the old firm.

**188.** Where the circumstances are not such that the retired partner may be omitted, the action must be brought by or against the partners of the old firm, precisely as though no change had occurred.<sup>62</sup>

<sup>61</sup> See ante, chapter IV, §§ 77-78, pp. 242-257. If a new firm, formed from an old firm by the retirement of a member, succeeds to and continues the business of the old firm in the same place, slight evidence is sufficient to warrant the inference that it has assumed the liabilities of the old firm; and, if it has assumed such liabilities, a partner has the same right to give partnership notes in payment of them as he has to give such notes in payment of the debts

<sup>62</sup> See chapter IV, § 77, p. 242, ante, where the commencement and duration of firm liability is discussed.

Much the same considerations apply to the case of the retirement of an old member as do to the case of the admission of a new one. The change operates equally as the dissolution of the old firm and the formation of a new one. The general rule is that a retired partner must join as plaintiff or defendant whenever such joinder would have been necessary had he not retired. The exceptions to this rule are practically the converse of the exceptions to the rule as to incoming partners. Thus, where the claim has been assigned to the new firm, or where, by consent of all the parties concerned, the new firm is substituted for the old as obligee, the retired partner should not join as plaintiff. Under similar circumstances, it has been seen that an incoming partner should join. So, where, by consent of all concerned, the new firm is substituted for the old as obligor, and where the new firm has become liable to creditors by assuming debts of the old firm, the action may be against the new firm, omitting the retired partner. Where the circumstances are not such that the retired partner may be omitted, the action must be brought by or against the partners of the old firm, precisely as though no change had occurred.<sup>82</sup>

*When Change in Firm Discharges Contract*

Although a change in a firm, whether by the introduction of a new partner or the retirement of an old one, cannot, except as already mentioned, confer upon the partners any new right of action against strangers, or vice versa, as

of the new firm. *Shaw v. McGregory*, 105 Mass. 96. See "*Partnership*," *Dec. Dig.* (Key No.) §§ 238, 239, 242; *Cent. Dig.* §§ 491, 492, 497, 503.

<sup>82</sup> *Lindl. Partn.* p. 236; *Dobbin v. Foster*, 1 Car. & K. 323. See, also, ante, § 180, p. 542. Where one member of an insolvent firm sells his interest with the agreement that the new firm shall assume the debts of the old, the assets of the new firm are charged in equity with a trust for the payment of the debts of the old, which may be enforced by a creditor of the old firm who has not consented to accept the new firm as his creditor instead of the old. *THAYER v. HUMPHREY*, 91 Wis. 276, 64 N. W. 1007, 30 L. R. A. 549, 51 Am. St. Rep. 887, *Gilmore, Cas. Partnership*, 546. See "*Partnership*," *Dec. Dig.* (Key No.) §§ 232, 236, 239, 242; *Cent. Dig.* §§ 481, 482, 484-488, 495, 503.

regards what may have occurred before the change took place, it may, nevertheless, operate so as to discharge a person from a contract previously entered into by him. Thus, a person who is surety to a firm is discharged from his suretyship, for the future, by a change among its members, and cannot therefore be sued either by the old or by the new partners for any default of the principal debtor occurring subsequently to the change.<sup>64</sup> Again, if a person enters into a contract with a firm, and that contract is of a purely personal character, to be performed by the individuals who have entered into it, and not by any one else, a change in the firm may operate as a dissolution of the contract, so that neither the new nor the old partners can sue in respect of any alleged breach which may have occurred since the change took place. An illustration of this is afforded by *Robson v. Drummond*.<sup>65</sup> In that case A. and B. were partners as coachmakers. C., who knew nothing of B., entered into a contract with A. for the hire of a carriage for five years, at so much a year, and A. undertook to keep the carriage in proper order for the whole five years. Before the five years were out, A. and B. dissolved partnership, and A. assigned the carriage and the benefit of the contract relating to it to B. B. gave C. notice of the dissolution and arrangement respecting the carriage; but C. declined to continue the contract with B., and returned the carriage. An action was then brought by A. and B. against C., for not performing the contract; but it was held that the action would not lie, the contract having been with A. alone, to be performed by him personally, and he having disabled himself from continuing to perform it on his part. In *Stevens v. Benning*,<sup>66</sup> the same principle was applied to a contract between an author and a firm of publishers; and it was held that the contract was one of a personal character,

<sup>64</sup> See ante, chapter IV, § 78, pp. 253, 255.

<sup>65</sup> 2 Barn. & Adol. 303. Cf. *British Waggon Co. v. Lea*, 5 Q. B. Div. 149. See "*Partnership*," *Dec. Dig. (Key No.)* §§ 235-238; *Cent. Dig.* §§ 484-494.

<sup>66</sup> 1 Kay & J. 168, 6 De Gex, M. & G. 223. See *Hole v. Bradbury*, 12 Ch. Div. 886. See "*Partnership*," *Dec. Dig. (Key No.)* §§ 235-238; *Cent. Dig.* §§ 484-494.

and that, consequently, the author was discharged from it by a change in the firm, and an assignment of the benefit of the contract to persons of whom the author knew nothing.

### SAME—DEATH OF MEMBER

**189.** After the death of a member, actions on partnership claims or obligations must be brought by or against the surviving partners, and ultimately the last survivor or his representatives.

Where a partner dies, all actions in respect of any contract entered into by or on behalf of the firm before his death must be brought by or against the surviving members of the firm, and by or against them alone. The representatives of the deceased partner can neither sue nor be sued at law in respect of any such contract.<sup>67</sup> So, an action for the conversion of partnership goods must be brought by the surviving partners.<sup>68</sup> It follows that the last surviving partner, or, if he be dead, his legal personal representative, is the proper person to sue and be sued at law in respect of the debts and engagements of the firm.<sup>69</sup> "These rules,

<sup>67</sup> *Lindl. Partn.* p. 289; *BASSETT v. MILLER*, 39 Mich. 133, *Gilmore, Cas. Partnership*, 271; *Dixon v. Hamond*, 2 Barn. & Ald. 310; *MARTIN v. CROMPE*, 1 Ld. Raym. 340, 2 Salk. 444; *BUCKLEY v. BARBER*, 6 Exch. 164, 178; *Murphy v. Cochran* (Iowa) 123 N. W. 349; *Shivel v. Greer* (Tex. Civ. App.) 123 S. W. 207. The administrator of a deceased partner cannot be joined with the surviving partners, as a defendant, in an action on the obligations of the firm. *Childs v. Hyde*, 10 Iowa, 294, 77 Am. Dec. 113. See chapter IV, § 73, p. 271, note 20, p. 205, ante, and chapter V, § 122, p. 353, ante, on the effect of death on firm liabilities and the rights of surviving partners. See "*Partnership*," *Dec. Dig. (Key No.)* §§ 243-247, 258; *Cent. Dig.* §§ 509-528, 569-575.

<sup>68</sup> *Kemp v. Andrews*, Carth. 170. But see *BUCKLEY v. BARBER*, 6 Exch. 164. See "*Partnership*," *Dec. Dig. (Key No.)* § 258; *Cent. Dig.* § 571.

<sup>69</sup> *Dicey, Parties*, p. 274, rule 58; *Lindl. Partn.* p. 289; *Richards v. Heather*, 1 Barn. & Ald. 29; *Calder v. Rutherford*, 3 Brod. & B. 302. "A joint contract is made by X., Y., and Z. The liability to be sued upon the contract passes, on the death of Z., to X. and Y.; on the subsequent death of Y., to X.; and, on the death

however, can be no longer relied upon, except where the obligation sought to be enforced is joint in equity, as well as at law. Wherever it is several as well as joint, an action may, it is apprehended, be brought by or against the surviving partners and the executors or administrators of the deceased partner."<sup>70</sup>

On the death pendente lite of a partner plaintiff, the action proceeds without amendment upon the mere suggestion of the death; and so, in case of the death of a partner defendant pendente lite, the liability survives against the survivors, and no revivor is necessary."<sup>71</sup>

of X. (provided the liability to be sued survives), to X.'s executor or administrator. The representatives, e. g. of Z., can neither be sued upon the contract themselves, nor be sued jointly with X. and Y. A person's separate liability on any contract passes, of course, to his representatives. If, therefore, X., Y., and Z. enter into a joint and several contract, and Z. die, X. and Y. may be sued on their joint contract, and Z.'s executor may be sued on Z.'s separate contract. In other words, a joint and several contract by X. and Y. is, in effect, three contracts,—a joint contract by X. and Y., a separate contract by X., and a separate contract by Y." Dicey, *Parties*, p. 238. See "*Partnership*," *Dec. Dig. (Key No.)* § 258; *Cent. Dig.* §§ 569-575.

<sup>70</sup> Lindl. Partn. p. 288. See, also, *DOGGETT v. DILL*, 108 Ill. 560, 48 Am. Rep. 565, Gilmore, *Cas. Partnership*, 300; *Nelson v. Hill*, 5 How. 127, 12 L. Ed. 81; *Blair v. Wood*, 108 Pa. 278; *Camp v. Grant*, 21 Conn. 41, 54 Am. Dec. 321; *Manning v. Williams*, 2 Mich. 105; *Pope v. Cole*, 55 N. Y. 124, 14 Am. Rep. 198; *Sherman v. Kreul*, 42 Wis. 33; *Pearson v. Keedy*, 6 B. Mon. (Ky.) 128, 43 Am. Dec. 160; *Pullen v. Whitfield*, 55 Ga. 174. See ante, chapter IV. § 72, p. 227. See "*Partnership*," *Dec. Dig. (Key No.)* § 258; *Cent. Dig.* §§ 569-575.

<sup>71</sup> *Phoenix Ins. Co. v. Moog*, 81 Ala. 335, 1 South. 108; *Gaines v. Beirne*, 3 Ala. 114; *Troy Iron & Nail Factory v. Winslow*, 11 Blatchf. 513, Fed. Cas. No. 14,199; *Townes v. Birchett*, 12 Leigh (Va.) 173; *Bowen v. Troy Portable Mill Co.*, 31 Iowa, 460; *Childs v. Hyde*, 10 Iowa, 294, 77 Am. Dec. 113; *Dunman v. Coleman*, 59 Tex. 199. See, also, *Sherman v. Kreul*, 42 Wis. 33; *Cragin v. Gardner*, 64 Mich. 399, 31 N. W. 206. See "*Abatement and Revival*," *Dec. Dig. (Key No.)* §§ 61, 64; *Cent. Dig.* §§ 317, 325.

## SAME—BANKRUPTCY AND INSOLVENCY

190. Actions on firm claims must be brought
  - (a) On the insolvency of the firm, by the trustee of the bankrupts.
  - (b) On the bankruptcy of one or more partners, by the solvent partners, together with the trustee or trustees of the bankrupt partner or partners.
191. Mere bankruptcy or insolvency of a firm or its members does not, previous to their discharge, affect their liability on firm obligations.
192. After discharge of the firm in bankruptcy, no action can be maintained against the partners on previous obligations of the firm.
193. After the discharge of one or more partners in bankruptcy, the action must be brought against the solvent partner or partners.

Where a partnership makes an assignment for the benefit of creditors, or is forced into bankruptcy, the partnership is dissolved, and its affairs must be wound up. In such case the assignee or trustee is the person to bring actions on firm claims.<sup>72</sup> Where one or more partners become bankrupt or make an assignment for the benefit of creditors of all their property, including their interest in the partnership, the firm is likewise dissolved; and actions on firm claims should thereafter be brought by the solvent partners, together with the trustee or trustees of the bankrupt partner or partners.<sup>73</sup> In such case it is held by some authorities that the assignee or trustee becomes a tenant

<sup>72</sup> Lindl. Partn. p. 289. See *Ray v. Davies*, 8 Taunt. 134; *Stonehouse v. De Silva*, 3 Camp. 399; *Hancock v. Haywood*, 3 Term R. 433. See "Partnership," *Dec. Dig. (Key No.)* § 271; *Cent. Dig.* § 616; "Bankruptcy," *Dec. Dig. (Key No.)* §§ 145, 149, 281; *Cent. Dig.* §§ 229, 428; "Insolvency," *Dec. Dig. (Key No.)* § 90; *Cent. Dig.* §§ 152-157.

<sup>73</sup> *Eckhardt v. Wilson*, 8 Term R. 140; *Thomason v. Frere*, 10 East, 418; *Graham v. Robertson*, 2 Term R. 282; *Hellbut v. Nevill*, L. R. 4 C. P. 354. If the assignees decline to join, the solvent partners were entitled to make use of their names upon indemnify-

in common with the solvent partner of all the partnership property.<sup>74</sup> By other authorities, however, it is held that the title to firm property in case of the bankruptcy of one partner passes to the solvent partner in the same way that it passes to the survivor in case of the death of a partner, and that he is the proper party to sue on firm claims.<sup>75</sup> The mere assignment or bankruptcy of a firm or its members does not, however, affect their liability on firm obligations. They continue liable and may be sued until such obligations are discharged.<sup>76</sup> After discharge of the firm in bankruptcy, no action can be maintained against the partners on previous obligations of the firm, unless they are such as cannot be discharged in bankruptcy.<sup>77</sup> After the discharge of one or more partners in bankruptcy, the action must be brought against the solvent partner or partners.<sup>78</sup> "There is no remedy by action against a trustee in respect of the bankrupt whom he represents. The remedy is by proof against the bankrupt's estate."<sup>79</sup>

ing them against the costs of the action. *Lindl. Partn.* p. 289; *Whitehead v. Hughes*, 2 *Cromp. & M.* 318; *Ex parte Owen*, 13 Q. B. Div. 113. An assignment of one partner's estate under the insolvent laws does not prevent all the partners from maintaining an action previously commenced on a debt due to the partnership. *Cunningham v. Munroe*, 15 *Gray (Mass.)* 471. See "*Partnership*," *Dec. Dig. (Key No.)* § 271; *Cent. Dig.* § 616; "*Bankruptcy*," *Dec. Dig. (Key No.)* §§ 145, 149, 281; *Cent. Dig.* §§ 229, 428; "*Insolvency*," *Dec. Dig. (Key No.)* § 90; *Cent. Dig.* §§ 132-137.

<sup>74</sup> *Dacey, Parties*, p. 160; *MURRAY v. MURRAY*, 5 *John. Ch. (N. Y.)* 60, *Gillmore, Cas. Partnership*, 578; *Wilkins v. Davis*, 15 *N. B. R.* 60, *Fed. Cas. No.* 17,664. See "*Partnership*," *Dec. Dig. (Key No.)* § 271; *Cent. Dig.* § 616; "*Bankruptcy*," *Dec. Dig. (Key No.)* §§ 149, 281; *Cent. Dig.* §§ 229, 428.

<sup>75</sup> *OGDEN v. ARNOT*, 29 *Hun (N. Y.)* 146; *Amsinck v. Bean*, 89 *U. S.* 395, 22 *L. Ed.* 801. See, for further discussion and cases, ante, chapter VII, § 151, p. 453. See "*Partnership*," *Dec. Dig. (Key No.)* § 271; *Cent. Dig.* § 616; "*Bankruptcy*," *Dec. Dig. (Key No.)* § 149, 281; *Cent. Dig.* § 229, 428.

<sup>76</sup> *Lindl. Partn.* p. 289.

<sup>77</sup> *Dacey, Parties*, p. 273.

<sup>78</sup> *Lindl. Partn.* p. 290; *Dacey, Parties*, p. 273; *Hawkins v. Ramsbottom*, 6 *Taunt.* 179; *MATTIX v. LEACH*, 16 *Ind. App.* 112, 43 *N. E.* 969. See "*Bankruptcy*," *Dec. Dig. (Key No.)* § 429; *Cent. Dig.* §§ 778, 782.

<sup>79</sup> *Dacey, Parties*, p. 273.

## DISQUALIFICATION OF ONE PARTNER TO SUE

194. In cases where all the partners must join as plaintiffs to enforce a firm claim, if one of the partners is disqualified to sue, no action at law can be maintained.

It has been seen that all the partners must join in an action on an obligation to a firm because it is in law an obligation to all the partners jointly.<sup>80</sup> Whenever, therefore, one partner is disqualified to sue upon a cause of action, no action can be maintained at law either by all the partners jointly, because by hypothesis one is disqualified, or by the other partners, because all must join.<sup>81</sup> The rule already discussed that no action at law lies upon a claim by a firm against one of its members, or vice versa, is an illustration of this principle. In such an action one partner would have to be joined both as a plaintiff and as a defendant, and a person is disqualified to sue himself.<sup>82</sup>

So, if a partnership become possessed of a negotiable security which has been procured by one partner upon the understanding that he will punctually provide for the payment thereof at its maturity, the partnership cannot sue upon such security, because the same partner must be made one of the plaintiffs; and, as it is clear in such a case that he could not maintain any suit in his own name thereon, the same objections will avail against him as a coplain-

<sup>80</sup> See ante, p. 530.

<sup>81</sup> Bates, Partn. § 1035 et seq. See, also, *Cochran v. Cunningham's Ex'r*, 16 Ala. 448, 50 Am. Dec. 186; *Morse v. Bellows*, 7 N. H. 549, 28 Am. Dec. 372; *Salmon v. Davis*, 4 Bin. (Pa.) 375, 5 Am. Dec. 410. See "Partnership," *Dec. Dig. (Key No.)* § 191; *Cent. Dig.* § 351.

<sup>82</sup> See ante, pp. 540, 542. Where three members of firm were liable as joint obligors with defendant, it was held that neither the firm nor the trustee in bankruptcy of the firm could sue defendant, as this would make one party both plaintiff and defendant. *Kalamazoo Trust Co. v. Merrill*, 159 Mich. 649, 124 N. W. 597. See "Partnership," *Dec. Dig. (Key No.)* § 115; *Cent. Dig.* § 178; "Bankruptcy," *Dec. Dig. (Key No.)* § 281; *Cent. Dig.* § 428.

tiff.<sup>83</sup> So, also, a partner holding a security of the firm by indorsement from the payee or other indorser cannot sue the indorser thereon.<sup>84</sup>

A partnership cannot maintain an action if one partner is an alien enemy. A state of war suspends all commercial intercourse between the belligerents, and shuts their courts against all suits and proceedings and all claims and persons who have acquired and retained a hostile character.<sup>85</sup>

Perhaps the most numerous class of cases where this doctrine is invoked is where one partner has wrongfully disposed of partnership property, as where he has released a firm debtor or used firm property in the payment of his individual debts, and the firm seeks to recover the debt or the property. This is obviously a firm claim, and the guilty partner is a necessary complaintiff. He cannot recover unless he is allowed to repudiate his former act, and unless he can recover his copartners cannot. The courts have hopelessly disagreed in their application of the doctrine to this class of cases.

In considering this class of cases, a distinction should be observed between (1) acts of the partner which, though wrongful, are yet done within the course of the partnership business, and which may therefore be considered as the acts of the firm, and (2) acts which are not done in the course of the partnership business, but which are wrongs to the other partners.

(1) A wrongful act done by one partner in the course of the partnership business is the wrongful act of the firm, and, of course, no cause of action in favor of the firm can arise from it.<sup>86</sup> Thus, fraud on the part of one partner in

<sup>83</sup> Story, Partn. § 237; Sparrow v. Chisman, 9 Barn. & C. 241. See Richmond v. Heapy, 1 Starkle, 202. See "Partnership," Dec. Dig. (Key No.) § 199; Cent. Dig. §§ 362-368.

<sup>84</sup> Bailey v. Bancker, 3 Hill (N. Y.) 188, 38 Am. Dec. 625. See "Partnership," Dec. Dig. (Key No.) §§ 104-110; Cent. Dig. §§ 156-172.

<sup>85</sup> Story, Partn. § 240; McConnell v. Hector, 3 Bos. & P. 113; Griswold v. Waddington, 16 Johns. (N. Y.) 438. See "War," Dec. Dig. (Key No.) § 10; Cent. Dig. §§ 26-36.

<sup>86</sup> But as between themselves, in the settlement of their partnership accounts, the wrongdoing partner may sometimes be solely chargeable with whatever damages arise from his act.

procuring a note is available as a defense to an action thereon by all the partners jointly; i. e. by the firm.<sup>87</sup> So, where one partner procures goods for the firm by false representations, and fraudulently disposes of them, all the partners are jointly liable.<sup>88</sup> Likewise, a release of a firm debt by one partner is ordinarily the act of the firm.<sup>89</sup>

(2) It is in the cases where a partner has wrongfully disposed of partnership property, not in the course of the partnership business, but in fraud of his copartners, that the decisions are most conflicting. Two classes of cases may be considered: (a) Where chattels, exclusive of money, are used, and (b) where money is used. Each will be considered separately. Where it is the credit of the firm that is used, as where one partner uses firm paper for his private purposes, the firm can defend by showing that the paper was issued without authority, except, of course, as to a bona fide holder. The rights and liabilities of the parties under these circumstances have already been discussed.<sup>90</sup>

(a) Where firm chattels other than money are wrongfully disposed of by one partner, various opinions are held as to the possibility of an action being maintained by the partners jointly for their recovery.

In some jurisdictions it is held squarely that the guilty partner cannot, by thus joining with him his copartners, repudiate his own act, but that his disability affects all the partners, and, therefore, that the action cannot be maintained.<sup>91</sup> *Jones v. Yates*<sup>92</sup> is a leading English case in

<sup>87</sup> *Kilgore v. Bruce*, 166 Mass. 136, 44 N. E. 108. See "*Partnership*," *Dec. Dig. (Key No.)* § 153; *Cent. Dig.* § 276.

<sup>88</sup> *Banner v. Schlessinger*, 109 Mich. 262, 67 N. W. 116. See "*Partnership*," *Dec. Dig. (Key No.)* § 153; *Cent. Dig.* § 276.

<sup>89</sup> *Dyer v. Sutherland*, 75 Ill. 583; *Myrick v. Dame*, 9 Cush. (Mass.) 248; *Gordon v. Albert*, 168 Mass. 150, 46 N. E. 423; *Cochran v. Cunningham's Ex'rs*, 16 Ala. 448, 50 Am. Dec. 186; *Salmon v. Davis*, 4 Bin. (Pa.) 375, 5 Am. Dec. 410; *Morse v. Bellows*, 7 N. H. 549, 28 Am. Dec. 372. See "*Partnership*," *Dec. Dig. (Key No.)* § 148; *Cent. Dig.* § 253.

<sup>90</sup> See ante, p. 306; *Bates, Partn.* § 1036.

<sup>91</sup> *Church v. First Nat. Bank of Chicago*, 87 Ill. 68 (cf. *Brewster v. Mott*, 4 Scam. [Ill.] 378); *SINDELARE v. WALKER*, 137 Ill.

<sup>92</sup> 9 Barn. & C. 532. See "*Partnership*," *Dec. Dig. (Key No.)* § 199; *Cent. Dig.* §§ 362-368.

support of this view. In that case, Sykes and Bury being partners, Sykes fraudulently gave the bills of the partnership in discharge of his private debt, and also applied part of the partnership funds to the same purpose. The question was whether the partners Sykes and Bury could recover in a joint action the amount of the bills and of the money in a court of law, by an action of trover for the bills of assumpsit for the money, and it was held that they could not. So, it has been held in this country that if one member of a partnership settles a demand due from him individually by setting off and discharging a demand due from his creditors to the partner, although this is a fraud upon the partnership, no action at law can be maintained on behalf of the partnership to recover the demand due it from such creditor.<sup>93</sup>

In some jurisdictions it is held just as squarely that the partners can maintain an action to recover the property. *Rogers v. Batchelor*<sup>94</sup> is the leading case in support of this view. Story, J., said: "In the case of a partner paying his own separate debt out of the partnership funds, it is manifest that it is a violation of his duty and of the rights of his partners unless they have assented. The act is an illegal conversion of the funds, and the separate creditor can have no better title to the funds than the partner himself had." The court further held that it made no difference whether the separate creditor had knowledge that there was a mis-

43, 27 N. E. 59, 31 Am. St. Rep. 353; *Homer v. Wood*, 11 Cush. (Mass.) 62; *Farley v. Lovell*, 103 Mass. 387; *Craig v. Hulschizer*, 34 N. J. Law, 363; *Weaver v. Rogers*, 44 N. H. 112; *Blodgett v. Sleeper*, 67 Me. 499; *Bumpus v. Turgeon*, 98 Me. 550, 57 Atl. 883. One who cannot sue by himself cannot do so merely by joining others with him. *Wallace v. Kelsall*, 7 Mees. & W. 264, per Parke. B. See "*Partnership*," *Dec. Dig. (Key No.)* § 199; *Cent. Dig.* §§ 362-368.

<sup>93</sup> In *Homer v. Wood*, 11 Cush. (Mass.) 62 (approved in *Grover v. Smith*, 165 Mass. 132, 42 N. E. 555, 52 Am. St. Rep. 506), the court limited its decision to the precise case before it, in which it was admitted that the defendant had acted in good faith in settling with the fraudulent parties. In *Grover v. Smith*, supra, Holmes, J., said that the good faith of defendant was immaterial. See "*Partnership*," *Dec. Dig. (Key No.)* § 144; *Cent. Dig.* §§ 236, 239.

<sup>94</sup> 12 Pet. 221, 9 L. Ed. 1063. See "*Partnership*," *Dec. Dig. (Key No.)* § 144; *Cent. Dig.* § 236.

appropriation of the partnership fund or not. The position taken was that, if he had such knowledge, he would be guilty of gross fraud, not only in morals, but in law; but that knowledge was not an essential ingredient in the case. The true question was said to be whether the title to the property had passed from the partnership to the separate creditor. If it had not, then the partnership might reassert its title to it in the hands of such creditor. This view is followed in many cases.<sup>95</sup> *Viles v. Bangs*<sup>96</sup> was an action for the value of goods sold to defendant. The defense was that the goods had been taken under an agreement with one partner in payment of his private debt. The court held that plaintiff could recover. The court said: "A recovery can only be defeated by the court sustaining this appropriation of the partnership property; and, by giving force and effect to the settlement, the plaintiff does not trace his cause of action through the wrongful act of his partner, but the defendants claim that he is bound by it."

In some jurisdictions the transaction may be treated as, in effect, a sale, and the separate creditor is liable to the firm in assumpsit for the value of the goods.<sup>97</sup> The doctrine has been held not applicable to counterclaims.<sup>98</sup> Where the guilty partner is not a party, as where the suit

<sup>95</sup> *Cotzhausen v. Judd*, 43 Wls. 213, 28 Am. Rep. 539; *Purdy v. Powers*, 6 Pa. 492; *Forney v. Adams*, 74 Mo. 138; *Ackley v. Staehlin*, 56 Mo. 558; *Thomas v. Pennrich*, 28 Ohio St. 55; *Burwell v. Springfield*, 15 Ala. 273; *Liberty Sav. Bank v. Campbell*, 75 Va. 534; *Johnson v. Crichton*, 56 Md. 108; *Busby v. Rooks*, 72 Ark. 657, 81 S. W. 1056; *McNair v. Wilcox*, 121 Pa. 437, 15 Atl. 575, 6 Am. St. Rep. 790. See "*Partnership*," *Dec. Dig. (Key No.)* § 144; *Cent. Dig.* §§ 234-239.

<sup>96</sup> 36 Wls. 131; *Estabrook v. Messersmith*, 18 Wls. 545, distinguished, but doubted. See "*Partnership*," *Dec. Dig. (Key No.)* § 144; *Cent. Dig.* §§ 236-239.

<sup>97</sup> *Daniel v. Daniel*, 9 B. Mon. (Ky.) 195. Cf. *Grover v. Smith*, 165 Mass. 132, 42 N. E. 555, 52 Am. St. Rep. 506. And see *Ackley v. Staehlin*, 56 Mo. 558; *Forney v. Adams*, 74 Mo. 138; *Dob v. Halsey*, 16 Johns. (N. Y.) 34, 8 Am. Dec. 293. See "*Partnership*," *Dec. Dig. (Key No.)* § 144; *Cent. Dig.* §§ 234-239.

<sup>98</sup> *Bates*, Partn. § 1043, citing *Cornells v. Stanhope*, 14 R. I. 97. See, also, *Craig v. Hulschizer*, 34 N. J. Law, 363. See "*Set-Off and Counterclaim*," *Dec. Dig. (Key No.)* §§ 44, 45; *Cent. Dig.* §§ 82-89.

is by an assignee for the benefit of creditors, the action has been sustained.<sup>99</sup> So, also, the disqualification does not affect the right of a creditor to pursue the property.<sup>1</sup>

Of course, the defrauded partners cannot maintain an action at law alone against either the guilty partner or the one with whom he dealt. The damage, being a joint damage, cannot be recovered in separate actions. The remedy is in equity.<sup>2</sup>

(b) Where the property wrongfully disposed of by one partner is money, as distinguished from other chattels of the firm, the title to the money, nevertheless, passes, and cannot be recovered by the firm, provided the grantee of the guilty partner acted bona fide. This is certainly true in those jurisdictions where it is held even as to ordinary chattels that they cannot be recovered by the firm, and it is probably true in all jurisdictions. Money is a peculiar species of property, and even a thief can pass title to it to an innocent person.<sup>3</sup> If the defendant knew the partner was using firm money, the ordinary rule applies; and it can be recovered or not, according to the view taken of the general question.<sup>4</sup>

<sup>99</sup> Thomas v. Stetson, 62 Iowa, 537, 17 N. W. 751, 49 Am. Rep. 148; Cotzhausen v. Judd, 43 Wis. 213, 28 Am. Rep. 539; Thomas v. Pennrich, 28 Ohio St. 55. See "Set-Off and Counterclaim," Dec. Dig. (Key No.) §§ 44, 45; Cent. Dig. §§ 82-99; "Partnership," Dec. Dig. (Key No.) § 144; Cent. Dig. §§ 236, 239.

<sup>1</sup> Bates, Partn. § 1045.

<sup>2</sup> Miller v. Price, 20 Wis. 117; Craig v. Hulschizer, 84 N. J. Law, 363; Fenton v. Block, 10 Mo. App. 536. See ante, p. 488. See, also, Halstead v. Shepard, 23 Ala. 558; Church v. First Nat. Bank of Chicago, 87 Ill. 68. One partner cannot maintain an action at law for damages against a vendee for partnership goods sold him by a copartner in fraud of plaintiff's rights. Reed v. Gould, 105 Mich. 368, 63 N. W. 415, 55 Am. St. Rep. 453. See "Partnership," Dec. Dig. (Key No.) §§ 193, 199; Cent. Dig. §§ 356, 362.

<sup>3</sup> See Bates, Partn. § 1048.

<sup>4</sup> Foster v. Fifield, 29 Me. 136; Davis v. Smith, 27 Minn. 390, 7 N. W. 731. See "Partnership," Dec. Dig. (Key No.) § 144; Cent. Dig. § 238.

## ACTION IN FIRM NAME

195. In some jurisdictions actions in the firm name are authorized by statute, either generally or where the names of the members are unknown at the time the action is commenced.

It has been seen that, in the absence of statute, actions must be brought by and against the partners as individuals. In England and in some of the states of this country, suits in the firm name are now authorized by statute, either generally or in cases where the names of the members are unknown.<sup>5</sup> These statutes are not mandatory, but are optional, and the partners may be sued in their individual names. The statutes being remedial, should be liberally construed. The following observations by Sir Frederick Pollock as to the effect of the English statutes, are in the main applicable to the American statutes: "These rules, it will be observed, do not introduce anything that amounts to the recognition of the firm as an artificial person, distinct from its members. They allow the name of the firm to be used for the purpose of making procedure quicker and easier; and creditors of a firm have now the great prac-

<sup>5</sup> *Alabama*: Code 1907, § 2506; *Levystein v. Gerson, Seligman Co.*, 147 Ala. 251, 41 South. 774. *California*: Code Civ. Proc. 1909, § 388. *Iowa*: Code 1897, § 3468. *Nebraska*: Cobbe's Ann. St. 1903, § 1023. *Montana*: Rev. Codes 1907, § 6497. *Ohio*: Bates' Ann. St. (6th Ed.) § 5011.

There can be no such thing as a partnership with one partner, and therefore a statute authorizing actions by a firm to be brought in the firm name does not authorize an action by an individual in a name indicating a partnership, which really does not exist, but under which he does business. *Stirling v. Heintzman*, 42 Mich. 449, 4 N. W. 165. Under the Nebraska statute, to authorize a partnership to sue in the firm name, the pleadings must set forth that the partnership was formed to carry on trade or business or to hold property in that state. *McJunkin v. Placek & Fittl*, 80 Neb. 373, 114 N. W. 411. See, also, *Heenan v. Parmele*, 80 Neb. 509, 114 N. W. 639; *Id.*, 80 Neb. 514, 118 N. W. 324. See "*Partnership*," *Dec. Dig. (Key No.)* § 197; *Cent. Dig.* § 360.

tical convenience of being able to pursue their claims, even to judgment, without first ascertaining who all the partners are. The substantive results, however, are the same as under the former practice. Actions between a firm and one of its own members, or between two firms having a common member, which are allowed by the law of Scotland, remain, it is conceived, inadmissible in England; and a judgment against a firm has precisely the same effect that a judgment against all the partners had formerly." •

• Pol. Partn. p. 121.

## CHAPTER X

## TERMINATION OF THE PARTNERSHIP

- 196. By Act of the Partners—Mutual Assent.
- 197. By Act of one Partner—Partnership at Will.
- 198. Partnership for Fixed Period.
- 199. Dissolution by Operation of Law.
  - (a) Death of a Partner.
  - (b) Bankruptcy of a Partner or of the Firm.
  - (c) Marriage of a Female Partner.
  - (d) Where the Business has Become Illegal.
  - (e) Alienation of Entire Firm Property or Partner's Interest Therein.
- 200. Dissolution by Judicial Decree—Impossibility of Success.
- 201. Incapacity or Insanity of a Partner.
- 202. Misconduct of Partner.
- 203. Annulment of Partnership.

## BY ACT OF THE PARTNERS—MUTUAL ASSENT

196. Any partnership may at any time be dissolved by mutual agreement of all the partners.

All partnerships, whether for a limited period or at will, may at any time be dissolved by mutual assent of the partners, clearly expressed. The parties who have made the contract can, as between themselves, dissolve it at any time.<sup>1</sup> Thus a written agreement of dissolution of a firm, containing full terms of settlement, deliberately executed, is binding on the partners, in the absence of fraud or mistake.<sup>2</sup> If the parties intend to put an end to the contract, this intention prevails, and the partnership contract is dissolved, the same as any other contract would be, whether

<sup>1</sup> *Bank of Montreal v. Page*, 98 Ill. 109; *Bragg v. Geddes*, 93 Ill. 39; *Wood v. Gault*, 2 Md. Ch. 433; *Hazell v. Clark*, 89 Mo. App. 78; *Kennedy v. Porter*, 109 N. Y. 526, 548, 17 N. E. 426; *Simpson v. Miller*, 51 Or. 232, 94 Pac. 567. See "Partnership," *Dec. Dig. (Key No.)* § 262; *Cent. Dig.* §§ 602, 605, 606.

<sup>2</sup> *Howard v. Pratt*, 110 Iowa, 533, 81 N. W. 722. See "Partnership," *Dec. Dig. (Key No.)* § 262; *Cent. Dig.* §§ 602, 605, 606.

this expression be by words, by writing, or by conduct.<sup>3</sup> Thus a dissolution may be brought about by the withdrawal of a partner from the business, or by the addition of a new partner, or by any of the many ways in which commercial men indicate an intent to dissolve business relations.<sup>4</sup> Where all the partners abandon the business and close up the concern, this amounts to a dissolution, without proof of any formal agreement to that effect.<sup>5</sup> So may a dissolution be brought about by the award of arbitration. Where partners have properly submitted their troubles to arbitrators, and these have correctly exercised the power conferred upon them, the result achieved by them stands for the agreement of the parties, and will, if necessary, be enforced by a court of equity.<sup>6</sup> Hence, where articles of partnership make provision for arbitration of all matters of difference between the partners, the arbitrator may, in case of dispute, award a dissolution.<sup>7</sup> The partnership may thus also be dissolved pursuant to the original agreement.<sup>8</sup> Or

<sup>3</sup> *Armstrong v. Fahnestock*, 19 Md. 58; *Wood v. Gault*, 2 Md. Ch. 433; *Paton v. Wright*, 15 How. Prac. (N. Y.) 481; *Green v. Waco State Bank*, 78 Tex. 2, 14 S. W. 253. See "*Partnership*," *Dec. Dig. (Key No.)* § 262; *Cent. Dig.* §§ 602, 605, 606.

<sup>4</sup> *Hatchett v. Blanton*, 72 Ala. 423; *Beaver v. Lewis*, 14 Ark. 138; *McCall v. Moss*, 112 Ill. 493; *Abat v. Penny*, 19 La. Ann. 289; *Violet v. Fairchild*, 6 La. Ann. 193; *Avery v. Craig*, 173 Mass. 110, 53 N. E. 153; *Spaunhorst v. Link*, 46 Mo. 197; *Mudd v. Bast*, 34 Mo. 465; *Warren v. Maloney*, 29 Mo. App. 101; *Abbot v. Johnson*, 32 N. H. 9; *Slemmer's Appeal*, 58 Pa. 168, 98 Am. Dec. 255; *Euless v. Tomlinson* (Tex. Civ. App.) 38 S. W. 534; *Bank of Mobile v. Andrews*, 2 Sneed (Tenn.) 535; *Peters v. McWilliams*, 78 Va. 567; *McMahon v. McClernan*, 10 W. Va. 419. But the mere taking of an account of stock does not per se work a dissolution. *Russell v. Leland*, 12 Allen (Mass.) 349. See "*Partnership*," *Dec. Dig. (Key No.)* §§ 259-276; *Cent. Dig.* §§ 599-623.

<sup>5</sup> *Ligare v. Peacock*, 109 Ill. 94; *Spurck v. Leonard*, 9 Ill. App. 174. See "*Partnership*," *Dec. Dig. (Key No.)* § 267; *Cent. Dig.* § 611.

<sup>6</sup> *Green v. Waring*, 1 W. Bl. 475. See "*Partnership*," *Dec. Dig. (Key No.)* §§ 82, 262; *Cent. Dig.* § 130.

<sup>7</sup> *Vawdrey v. Simpson*, [1896] 1 Ch. 166. See "*Partnership*," *Dec. Dig. (Key No.)* §§ 82, 261; *Cent. Dig.* § 130.

<sup>8</sup> *Onstott v. Ogle*, 234 Ill. 454, 84 N. E. 1059, reversing *Ogle v. Onstott*, 136 Ill. App. 588. See "*Partnership*," *Dec. Dig. (Key No.)* §§ 261, 262; *Cent. Dig.* §§ 600-606.

the agreement may contemplate the accomplishment of a certain purpose, and, this being realized, the partnership is at an end. Thus a partnership has been held to be dissolved where a bank closed its doors and ceased to do business,<sup>9</sup> or where the building contemplated in the agreement has been completed,<sup>10</sup> or where the business consisted in dealing in war scrip, and the supply of such scrip has, on account of the termination of the war, completely stopped.<sup>11</sup>

### SAME—BY ACT OF ONE PARTNER—PARTNERSHIP AT WILL

**197. A partnership at will may be dissolved at any time by any partner for any reason.**

A partnership not formed for some specified time or for the accomplishment of a particular object is a partnership at will, and hence may be dissolved at the mere caprice of any partner,<sup>12</sup> who, however, must give due notice of his intention to his copartners, though this notice need not be in writing or by express declaration, but may be mere conduct or implication from circumstances.<sup>13</sup> Where the partners merely continue their former dealings after the time

<sup>9</sup> *POTTER v. TOLBERT*, 113 Mich. 486, 71 N. W. 849. See "Partnership," *Dec. Dig. (Key No.)* § 266; *Cent. Dig.* § 610.

<sup>10</sup> *Sims v. Smith*, 11 Rich. Law (S. C.) 565. See "Partnership," *Dec. Dig. (Key No.)* § 266; *Cent. Dig.* § 610.

<sup>11</sup> *Jones v. Jones*, 18 Ohio Cir. Ct. R. 260, 10 O. C. D. 71. See "Partnership," *Dec. Dig. (Key No.)* §§ 266, 267; *Cent. Dig.* §§ 610, 611.

<sup>12</sup> *Blaker v. Sands*, 29 Kan. 554; *Major v. Todd*, 84 Mich. 85, 47 N. W. 841; *WALKER v. WHIPPLE*, 58 Mich. 476, 25 N. W. 472, *Gillmore, Cas. Partnership*, 591; *Stitt v. Rat Portage Lumber Co.*, 98 Minn. 52, 107 N. W. 824; *Loorya v. Kupperman*, 25 Misc. Rep. 518, 54 N. Y. Supp. 1005; *Wright v. Ross*, 30 Tex. Civ. App. 207, 70 S. W. 234; *Meysenburg v. Littlefield* (C. C.) 135 Fed. 184; *Master v. Kirton*, 3 Ves. 74; *Miles v. Thomas*, 9 Sim. 606, 609; *Nerot v. Burnand*, 4 Russ. 247, 260. See "Partnership," *Dec. Dig. (Key No.)* §§ 61, 259½, 263; *Cent. Dig.* §§ 600-602, 607.

<sup>13</sup> *Abbot v. Johnson*, 82 N. H. 9. See "Partnership," *Dec. Dig. (Key No.)* §§ 259½, 263; *Cent. Dig.* §§ 600-602, 607.

of the partnership has expired, a partnership at will comes into existence, which, however, will be governed by the terms of the former agreement so far as they are applicable.

### SAME—PARTNERSHIP FOR FIXED PERIOD

198. Whether a partnership for a fixed period can be dissolved prematurely by the act of less than all the partners is a question upon which the courts are divided; some holding that it can be thus dissolved, the misconducting partners being liable in damages for breach of contract, and others holding that the relation is indissoluble.

Where the partnership is for a fixed term, or for the accomplishment of a particular object, the question whether any party to it may dissolve it at his mere pleasure presents many difficulties, and has led to a division of the authorities. The courts on the one side enforce the contract with all its consequences, creating thereby in effect an irrevocable agency. They lay stress on the wrong that would be done to the remaining partners if a member were allowed to withdraw, for which wrong damages might be an insufficient remedy. They also urge that equity will dissolve the relation at the suit of the innocent party, where it has become intolerable.<sup>14</sup>

<sup>14</sup> *Blisset v. Daniel*, 10 Hare, 493; *Wood v. Woad*, L. R. 9 Exch. 190; *Barnes v. Youngs*, [1898] 1 Ch. 414; *Pollock's Digest of Partnership* (6th Ed.) 80; *Lindl. on Partnership* (7th Ed.) 574; *Howell v. Harvey*, 5 Ark. 270, 39 Am. Dec. 376; *CASH v. EARNSHAW*, 66 Ill. 402, *Gilmore, Cas. Partnership*, 605; *Gerard v. Gateau*, 84 Ill. 121, 125, 25 Am. Rep. 438; *Berry v. Folkes*, 60 Miss. 576; *Van Kuren v. Trenton Locomotive & Machine Mfg. Co.*, 13 N. J. Eq. 306; *Sieghortner v. Weissenborn*, 20 N. J. Eq. 127; *Ferrero v. Buhlmeier*, 34 How. Prac. (N. Y.) 33; *Bishop v. Breckles*, Hoff. Ch. (N. Y.) 534; *Hannaman v. Karrick*, 9 Utah, 236, 33 Pac. 1039, reversed in 168 U. S. 328, 18 Sup. Ct. 135, 42 L. Ed. 484; *Pearpoint v. Graham*, 4 Wash. C. C. 232, Fed. Cas. No. 10,877; *Cole v. Moxley*, 12 W. Va. 730. See "*Partnership*," *Dec. Dig. (Key No.)* §§ 259½, 272; *Cent. Dig.* §§ 600-602, 619.

On the other hand, courts holding the contrary doctrine lay stress upon the unwisdom and impossibility of compelling an unwilling and dissatisfied partner to remain in the connection at the almost certain risk of litigation and loss, and therefore hold that no irrevocable agency has been created, but leave the other partners to their remedy for damages for the breach of the partnership agreement.<sup>15</sup> "There can be no such thing as an indissoluble partnership. Every partner has an indefeasible right to dissolve the partnership, as to all future contracts, by publishing

<sup>15</sup> "A contract of partnership is one by which two or more persons agree to carry on a business for their common benefit, each contributing property or services, and having a community of interest in the profits. It is, in effect, a contract of mutual agency, each partner acting as principal in his own behalf and as agent for his copartner. Every partnership creates a personal relation between the partners, rests upon their mutual consent, and exists between them only. Without their agreement or approval, no third person can become a member of the partnership, either by act of a single partner or by operation of law; and the death or bankruptcy of a partner dissolves the partnership. So an absolute assignment by one partner of all his interest in the partnership to a stranger dissolves the partnership, although it does not make the assignee a tenant in common with the other partners in the partnership property. No partnership can efficiently or beneficially carry on business without the mutual confidence and co-operation of all the partners. Even when, by the partnership articles, they have covenanted with each other that the partnership shall continue for a certain period, the partnership may be dissolved at any time, at the will of any partner, so far as to put an end to the partnership relation, and to the authority of each partner to act for all, but rendering the partner who breaks his covenant liable to an action at law for damages, as in other cases of breaches of contract." *Karrick v. Hanaman*, 168 U. S. 323, 334, 335, 18 Sup. Ct. 135, 138, 42 L. Ed. 494, by Gray, J.; *Swift v. Ward*, 80 Iowa, 700, 45 N. W. 1044, 11 L. R. A. 302; *Blake v. Dorgan*, 1 G. Greene (Iowa) 537; *MONROE v. CONNER*, 15 Me. 178, 32 Am. Dec. 148, *Gilmore, Cas. Partnership*, 393; *Cape Sable Co.'s Case*, 3 Bland (Md.) 606; *Mason v. Connell*, 1 Whart. (Pa.) 381; *Slemmer's Appeal*, 58 Pa. 168, 98 Am. Dec. 235; *Green v. Waco State Bank*, 78 Tex. 2, 14 S. W. 253; *Lapenta v. Lettieri*, 72 Conn. 377, 44 Atl. 730, 77 Am. St. Rep. 315. The following statutory provisions recognize the right: Civ. Code Cal. § 2451; Civ. Code Ga. 1895, § 2633; Civ. Code N. D. § 5848; Civ. Code S. D. § 1753. See "*Partnership*," *Dec. Dig. (Key No.)* §§ 259½, 272; *Cent. Dig.* §§ 600-602, 619.

his own volition to that effect; and after such publication the other members of the firm have no capacity to bind him by any contract. Even where partners covenant with each other that the partnership shall continue seven years, either partner may dissolve it the next day, by proclaiming his determination for that purpose; the only consequence being that he thereby subjects himself to a claim for damages for a breach of his covenant. The power given by one partner to another to make joint contracts for them both is not only a revocable power, but a man can do no act to divest himself of the capacity to revoke it."<sup>16</sup>

While, however, the courts are divided on the question whether a resort to them is necessary at all where less than all the partners want to dissolve a partnership for a term, they are agreed that they will lend their aid to such end where serious cause exists, such as total incapacity or gross misconduct of a partner or hopeless state of the partnership business.

### DISSOLUTION BY OPERATION OF LAW

199. The partnership is dissolved by operation of law, with no necessity of notice, in the following cases:

- (a) Death of a partner.
- (b) Bankruptcy of a partner or of the firm.
- (c) Marriage of a female partner.
- (d) Where the business has become illegal.
- (e) Alienation of the entire firm property or partner's interest therein.

#### *Death of a Partner*

As partnerships are based on the *delectus personarum*, every addition or subtraction from a partnership dissolves the firm, whether it is for a term or at will. Where, therefore, one partner dies, the firm immediately is dissolved by

<sup>16</sup> *Skinner v. Dayton*, 19 Johns. (N. Y.) 513, 538, 10 Am. Dec. 286; *SOLOMON v. KIRKWOOD*, 55 Mich. 256, 259, 21 N. W. 336, Gilmore, *Cas. Partnership*, 589. See "*Partnership*," *Dec. Dig. (Key No.)* § 259½; *Cent. Dig.* §§ 600-602.

operation of law, without notice or judicial decree.<sup>17</sup> And a special partnership is dissolved by the death of the special partner.<sup>18</sup> The cases which hold that a partnership may by previous agreements be continued after the death of a partner,<sup>19</sup> or that it may be continued under the will of the deceased partner with the consent of the survivors,<sup>20</sup> or by a court of equity, the surviving partners consenting,<sup>21</sup> do not establish any contrary doctrine. "What is inaccurately called provision against the dissolution of the partnership is an agreement that if either party dies his property shall remain in the firm and in the business for the benefit of his children, or that his children, or some one of them, or some other person, shall immediately on his death take his place in the firm and become partner in his stead. All these agreements and arrangements, and all

<sup>17</sup> *Parker v. Parker*, 99 Ala. 239, 13 South. 520, 42 Am. St. Rep. 48; *McCall v. Moss*, 112 Ill. 493; *Schmidt v. Archer*, 113 Ind. 365, 14 N. E. 543; *Powell v. North*, 3 Ind. 392, 56 Am. Dec. 513; *Williamson v. Wilson*, 1 Bland (Md.) 418; *Egberts v. Wood*, 3 Paige (N. Y.) 517, 24 Am. Dec. 236; *Washburn v. Goodman*, 17 Pick. (Mass.) 519; *Roberts v. Kelsey*, 38 Mich. 602; *Durant v. Pierson*, 124 N. Y. 444, 26 N. E. 1095, 12 L. R. A. 146, 21 Am. St. Rep. 686; *McNaughton v. Moore*, 2 N. C. 189; *McGrath v. Cowen*, 57 Ohio St. 385, 49 N. E. 338; *Jones v. McMichael*, 12 Rich. Law (S. C.) 176; *Bank of Mobile v. Andrews*, 2 Sneed (Tenn.) 535; *Landa v. Shook*, 87 Tex. 608, 30 S. W. 536; *Altgelt v. D. Sullivan & Co.* (Tex. Civ. App.) 79 S. W. 333; *Davis v. Christian*, 15 Grat. (Va.) 11; *Burwell v. Cawood*, 2 How. 560, 11 L. Ed. 378; *PEARCE v. CHAMBERLAIN*, 2 Ves. Sr. 34, *Gilmore, Cas. Partnership*, 592. See "*Partnership*," *Dec. Dig. (Key No.)* § 275; *Cent. Dig.* § 621.

<sup>18</sup> *AMES v. DOWNING*, 1 Bradf. Sur. (N. Y.) 321, *Gilmore, Cas. Partnership*, 610. See "*Partnership*," *Dec. Dig. (Key No.)* § 275; *Cent. Dig.* § 621.

<sup>19</sup> *Duffield v. Brainerd*, 45 Conn. 424; *Powell v. Hopson*, 13 La. Ann. 626; *Gratz v. Bayard*, 11 Serg. & R. (Pa.) 41; *Alexander's Ex'rs v. Lewis*, 47 Tex. 481; *Davis v. Christian*, 15 Grat. (Va.) 11; *Walker v. Walt*, 50 Vt. 608. See, for further discussion, chapter II, § 22, p. 69 et seq. See "*Partnership*," *Dec. Dig. (Key No.)* §§ 255, 274; *Cent. Dig.* §§ 552-561, 621.

<sup>20</sup> *Pitkin v. Pitkin*, 7 Conn. 307, 18 Am. Dec. 111; *Burwell v. Cawood*, 2 How. 560, 11 L. Ed. 378. See "*Partnership*," *Dec. Dig. (Key No.)* §§ 255, 274; *Cent. Dig.* §§ 552-561, 621.

<sup>21</sup> *Powell v. North*, 3 Ind. 392, 56 Am. Dec. 513. See "*Partnership*," *Dec. Dig. (Key No.)* §§ 255, 274; *Cent. Dig.* §§ 552-561, 621.

that can be made for a similar purpose, are, in fact, only bargains for the creation of a new partnership when the old one ceases to exist.”<sup>22</sup> Hence it has been held that no provision in the partnership contract can prevent its dissolution on the death of a partner. “If such an agreement is valid for three years after death, it must be equally so for one hundred years, and thus by partnership agreements, appearing valid on their face, the whole law relating to wills and trusts could be circumvented and rendered practically of no effect.”<sup>23</sup> What effect outlawry or civil death of a partner would have on the partnership does not seem to have been adjudicated. It would seem, however, that this would work a dissolution, the same as natural death would.<sup>24</sup> Since the rule that a partnership is dissolved by death depends entirely on the *delectus personarum*, and since usually a mining partnership is abnormal, in that it does not conform to the principle of *delectus personarum*, such partnership may not be dissolved by the death of a partner.<sup>25</sup>

*Bankruptcy of a Partner or of the Firm*

Bankruptcy of a partner works a dissolution by operation of law, since the bankrupt ceases to control his property, and the same passes to his assignee in very much the same way as the property of a deceased person passes to his executor or administrator; the acts of the bankrupt after bankruptcy being void.<sup>26</sup> The actual adjudication,

<sup>22</sup> *Kennedy v. Porter*, 109 N. Y. 526, 549, 17 N. E. 426. See, also, *McGrath v. Cowen*, 57 Ohio St. 385, 401, 49 N. E. 338. See “Partnership,” *Dec. Dig. (Key No.)* §§ 255, 274; *Cent. Dig.* §§ 552-561, 621.

<sup>23</sup> *Laney v. Laney*, 6 Dem. Sur. (N. Y.) 241. *Kennedy v. Porter*, *supra*. The court in the latter case, on page 549 of 109 N. Y., page 435 of 17 N. E., said (quoting *Parsons on Partnership*, p. 407): “We do not believe that any provision made beforehand, in reference to the death of a partner, or any agreements or arrangements made subsequently to his death, can prevent this dissolution.” See, for further discussion, chapter II, § 22, p. 69 et seq. See “Partnership,” *Dec. Dig. (Key No.)* §§ 255, 274; *Cent. Dig.* §§ 552-561, 621.

<sup>24</sup> *Parsons on Partnership*, § 301; *Story on Partnership*, § 303.

<sup>25</sup> *Taylor v. Castle*, 42 Cal. 367; *Jones v. Clark*, 42 Cal. 180. See “*Mines and Minerals*,” *Dec. Dig. (Key No.)* § 100; *Cent. Dig.* § 225.

<sup>26</sup> *McNutt v. Kling*, 59 Ala. 597; *Meinhard, Schaul & Co. v. Folsom*

however, is not necessary, and an admission of insolvency is enough, if put in legal form before a court. But the mere fact of insolvency does not operate as a dissolution, but there must be some act of bankruptcy, such as stopping payment or assignment.<sup>27</sup> All persons must take notice of dissolution by bankruptcy, since the dissolution is by operation of law.<sup>28</sup> A partner's bankruptcy, however, will not dissolve the firm, even if the partner has been adjudicated a bankrupt, where this adjudication was obtained by his copartner merely for that purpose.<sup>29</sup>

In the same way a firm is dissolved if it becomes bankrupt. Thus a valid assignment by a partnership of all the firm assets, except property exempt from execution, operates as a dissolution of the partnership.<sup>30</sup>

#### *Marriage of a Female Partner*

At common law a woman by marriage lost all control over her property, and her personalty passed absolutely to

Bros., 3 Ga. App. 251, 59 S. E. 830; Hardy v. Weyer, 42 Ind. App. 343, 85 N. E. 731; Williamson v. Wilson, 1 Bland (Md.) 418; Dearborn v. Keith, 5 Cush. (Mass.) 224; EUSTIS v. BOLLES, 146 Mass. 413, 16 N. E. 286, 4 Am. St. Rep. 327, Gilmore, Cas. Partnership, 603; HALSEY v. NORTON, 45 Miss. 703, 7 Am. Rep. 745, Gilmore, Cas. Partnership, 583; Marquand v. N. Y. Mfg. Co., 17 Johns. (N. Y.) 525, 535; Blackwell v. Claywell, 75 N. C. 213; Amsinck v. Bean, 22 Wall. 395, 404, 22 L. Ed. 801; FOX v. HANBURY, Cowp. 445, 418; Morgan v. Marquis, 9 Ex. 145, 147. See "*Partnership*," Dec. Dig. (Key No.) § 271; Cent. Dig. § 616.

<sup>27</sup> Arnold v. Brown, 24 Pick. (Mass.) 89, 35 Am. Dec. 296; Siegel v. Chidsey, 28 Pa. 279, 70 Am. Dec. 124.

In some jurisdictions a voluntary assignment by a partner for the benefit of creditors work an immediate dissolution. Wells v. Ellis, 68 Cal. 243, 9 Pac. 80; WELLES v. MARCH, 30 N. Y. 344. In other jurisdictions it gives to the copartners an option to have a dissolution. Williston v. Camp, 9 Mont. 88, 22 Pac. 501; English Part. Act 1890, § 33 (2). See "*Partnership*," Dec. Dig. (Key No.) § 271; Cent. Dig. § 616.

<sup>28</sup> EUSTIS v. BOLLES, 146 Mass. 413, 16 N. E. 286, 4 Am. St. Rep. 327, Gilmore, Cas. Partnership, 603. See "*Partnership*," Dec. Dig. (Key No.) §§ 271, 289; Cent. Dig. § 616.

<sup>29</sup> Amsinck v. Bean, 22 Wall. 395, 404, 22 L. Ed. 801. See "*Partnership*," Dec. Dig. (Key No.) § 271; Cent. Dig. § 616.

<sup>30</sup> Wells v. Ellis, 68 Cal. 243, 9 Pac. 80; Clark v. Wilson, 19 Pa. 414; McKelvy's Appeal, 72 Pa. 409. See "*Partnership*," Dec. Dig. (Key No.) §§ 264, 271; Cent. Dig. §§ 616, 617.

her husband. It followed that marriage dissolved the partnership, since her husband was substituted for her as effectively as an executor is substituted for a deceased person.<sup>31</sup> Since the statutory enlargement of the rights of married women with respect to their separate property and to engaging in business, it is generally held that they may be partners with any one except their husbands. The marriage of a single woman partner with a third person will not, therefore, dissolve the firm.<sup>32</sup> As to whether the intermarriage of a female partner and her male copartner will work a dissolution depends upon whether husband and wife can be members of the same firm. Under modern statutes the states are divided on this question, such states as Iowa, Georgia, Pennsylvania, and Vermont holding that she can, while Massachusetts, Arkansas, Indiana, Michigan, South Carolina, Texas, and Wisconsin hold that she cannot.<sup>33</sup> In accordance with the second view, it has been held that where partners intermarried the partnership was at an end; the court saying: "The fact is certain that the subsequent intermarriage of the parties worked an instantaneous dissolution of the relation."<sup>34</sup> If the question whether the intermarriage of partners dissolves the partnership should come up in these states, the solution of the question would undoubtedly depend upon the question whether a married woman can be a partner of her husband. Courts holding that she cannot would doubtless hold that marriage dissolved the partnership, while a contrary conclusion would be reached by the courts holding that a wife can be a partner of her husband.

<sup>31</sup> *Brown v. Chancellor*, 61 Tex. 439; *Nerot v. Burnand*, 4 Russ. 248, 260. See "*Husband and Wife*," *Dec. Dig. (Key No.)* § 97; *Cent. Dig.* § 373.

<sup>32</sup> See chapter II, § 24, p. 85.

<sup>33</sup> See a note in 4 Eng. & Am. Ann. Cas. 868. See ante, chapter II, § 24, pp. 86, 87, for the cases. See "*Partnership*," *Cent. Dig.* § 618; "*Husband and Wife*," *Dec. Dig. (Key No.)* §§ 42, 97; *Cent. Dig.* §§ 225, 373.

<sup>34</sup> *BASSETT v. SHEPARDSON*, 52 Mich. 3, 17 N. W. 217. See "*Partnership*," *Cent. Dig.* § 618; "*Husband and Wife*," *Dec. Dig. (Key No.)* §§ 42, 97; *Cent. Dig.* §§ 255, 373.

*Where the Business has Become Illegal*

The law does not recognize a partnership for an illegal purpose. It would be against public policy to do so. Equally the law refuses further to recognize a business which, while at one time legal, has now become illegal. Thus it was held that a firm of attorneys was dissolved by operation of law when one of the members became a circuit judge; a state law absolutely prohibiting circuit judges from practicing law, directly or indirectly.<sup>85</sup> The most striking example, however, is the case of a partnership among residents of different nations between whom war has been declared. Where war is declared, commercial intercourse between the citizens of the belligerent countries becomes illegal, and hence the partnership is dissolved by operation of law.<sup>86</sup> It would also be impossible to continue the relation as the parties to it are in law enemies of each other, and the trust relation and the relation of principal and agent between the parties has become difficult, if not impossible.

*Alienation of Entire Firm Property or Partner's Interest Therein*

By conveying away all the partnership property, or his interest therein, a partner does by his own act what the law does in the case of the death of a partner or the marriage of a female partner; and hence the partnership is dissolved. "The principle on which this doctrine rests is, on the one hand, that new partners cannot be introduced into the firm without the consent of all the other partners; and, on the other hand, that the creditors of the partner

<sup>85</sup> *Justice v. Lairy*, 19 Ind. App. 272, 49 N. E. 459, 65 Am. St. Rep. 405. See chapter II, § 30, p. 100. See "*Attorney and Client*," *Dec. Dig.* (Key No.) § 30; *Cent. Dig.* § 43.

<sup>86</sup> *McAdams' Ex'rs v. Hawes*, 9 Bush (Ky.) 15; *Mutual Ben. Life Ins. Co. v. Hillyard*, 37 N. J. Law. 444, 18 Am. Rep. 741; *Hubbard v. Matthews*, 54 N. Y. 43, 13 Am. Rep. 562; *Woods v. Wilder*, 43 N. Y. 164, 3 Am. Rep. 684; *GRISWOLD v. WADDINGTON*, 15 Johns. (N. Y.) 57, *Gilmore, Cas. Partnership*, 600; *Taylor v. Hutchison*, 25 Grat. (Va.) 536, 18 Am. Rep. 699; *Douglas v. United States*, 14 Ct. Cl. 1; *Exposito v. Bowden*, 7 El. & B. 763, 794. See "*Partnership*," *Dec. Dig.* (Key No.) § 268; *Cent. Dig.* § 612.

taking his property by assignment cannot be involved against their consent in the responsibility of the continuance of the partnership business. This doctrine is firmly established, where the partnership is for an indefinite term; but it has not been received without dissent where the partnership is for a definite term. \* \* \* Under such an arrangement it has been held that an assignment by one partner of his interest in the partnership property is a cause for dissolution (it may be on equitable terms), and an accounting, on the application of the assignee, and is ipso facto a dissolution of the partnership, at the option of the other partners."<sup>87</sup>

It makes no difference whether the conveyance is to third parties,<sup>88</sup> or even to a copartner.<sup>89</sup> But in the latter

<sup>87</sup> Davis v. Megroz, 55 N. J. Law, 427, 26 Atl. 1009, 1010. Compare Riddle v. Whitehill, 135 U. S. 621, 633, 10 Sup. Ct. 924, 34 L. Ed. 282.

See, also, Miller v. Brigham, 50 Cal. 615; Blake v. Sweeting, 121 Ill. 67, 12 N. E. 67; Leonard v. Sparks, 109 La. 543, 33 South. 594; Avery v. Craig, 173 Mass. 110, 53 N. E. 153; De Manderfield v. Field, 7 N. M. 17, 32 Pac. 146; Mumford v. McKay, 8 Wend. (N. Y.) 442, 24 Am. Dec. 34; Haeberly's Appeal, 191 Pa. 239, 43 Atl. 207; Moore v. Steele, 67 Tex. 435, 3 S. W. 448; Moore v. May, 117 Wis. 192, 94 N. W. 45.

The effect of such a conveyance should be considered in connection with the question of the power of one partner to dissolve a partnership for a fixed term. See ante, p. 571. See "Partnership," Dec. Dig. (Key No.) §§ 264, 269; Cent. Dig. §§ 608, 613, 614, 617.

<sup>88</sup> MONROE v. HAMILTON, 60 Ala. 226; Miller v. Brigham, 50 Cal. 615; McCall v. Moss, 112 Ill. 493; Barkley v. Tapp, 87 Ind. 25; Whitton v. Smith, Freem. Ch. (Miss.) 231; Freeman v. Hemenway, 75 Mo. App. 611; De Manderfield v. Field, 7 N. M. 17, 32 Pac. 146; Marquand v. N. Y. Mfg. Co., 17 Johns. (N. Y.) 525; Buford v. Neely, 17 N. C. 481; Marx v. Goodnough, 16 Or. 26, 16 Pac. 918; Ayer v. Ayer, 41 Vt. 346; Ballard v. Callison, 4 W. Va. 326; Westbrook v. Wheeler, 25 Ont. 559. See "Partnership," Dec. Dig. (Key No.) §§ 264, 269; Cent. Dig. §§ 608, 613, 614, 617.

<sup>89</sup> Schleicher v. Walker, 28 Fla. 680, 10 South. 33; Clark v. Carr, 45 Ill. App. 469; Lesure v. Norris, 11 Cush. (Mass.) 328; Wiggin v. Goodwin, 63 Me. 389, 391; Sistare v. Cushing, 4 Hun (N. Y.) 503; Spaunhorst v. Link, 46 Mo. 197; Cochran v. Perry, 8 Watts & S. (Pa.) 262; Rogers v. Nichols, 20 Tex. 719, 724; Heath v. Sansom, 4 Barn & Adol. 172, 175. See "Partnership," Dec. Dig. (Key No.) §§ 264, 269; Cent. Dig. §§ 608, 613, 614, 617.

case the courts may treat the sale merely as evidence tending to prove a dissolution.<sup>40</sup> A sale by one partner, however, does not bring about a dissolution, if all the partners retain some share in the business, and none of them in consequence of the sale goes out.<sup>41</sup> A mortgage by way of security of a partner's interest in the firm has been held to work a dissolution;<sup>42</sup> but the better opinion holds this not to be a dissolution, where a continuance of the partnership is contemplated.<sup>43</sup> Thus a chattel mortgage by one partner of his copartnership interest has been held not necessarily to dissolve the firm.<sup>44</sup>

While the mere filing of an attachment against partnership property,<sup>45</sup> or the seizure of property under a writ of attachment,<sup>46</sup> has no effect in dissolving the firm, the levy of execution and sale under such levy effects a dissolution,<sup>47</sup> except where the levy and sale were collusive, to

<sup>40</sup> *Waller v. Davis*, 59 Iowa, 103, 12 N. W. 798; *Taft v. Buffum*, 14 Pick. (Mass.) 322; *Lobdell v. Baldwin*, 93 Mich. 569, 53 N. W. 730. See "*Partnership*," *Dec. Dig. (Key No.)* §§ 264, 269; *Cent. Dig.* §§ 608, 613, 614, 617.

<sup>41</sup> *MONROE v. HAMILTON*, 60 Ala. 226; *Taft v. Buffum*, 14 Pick. (Mass.) 322; *Russell v. Leland*, 12 Allen (Mass.) 349; *Russell v. White*, 63 Mich. 409, 29 N. W. 865. See "*Partnership*," *Dec. Dig. (Key No.)* § 264; *Cent. Dig.* §§ 608, 614, 617.

<sup>42</sup> *Bank of State of North Carolina v. Fowle*, 57 N. C. 8, 10; *Horton's Appeal*, 13 Pa. 67, 71; *Carroll v. Evans*, 27 Tex. 262. See "*Partnership*," *Dec. Dig. (Key No.)* § 264; *Cent. Dig.* § 608.

<sup>43</sup> *MONROE v. HAMILTON*, 60 Ala. 226; *Dupont v. McLaran*, 61 Mo. 502; *Receivers of Mechanics' Bank of Paterson v. Godwin*, 5 N. J. Eq. 334, 338; *Ferrero v. Buhlmeier*, 34 How. Prac. (N. Y.) 33; *Brown v. Beecher*, 120 Pa. 590, 607, 15 Atl. 608. See "*Partnership*," *Dec. Dig. (Key No.)* § 264; *Cent. Dig.* §§ 608, 614, 617.

<sup>44</sup> *State v. Quick*, 10 Iowa, 451; *Inglis v. Floyd*, 33 Mo. App. 565. See "*Partnership*," *Dec. Dig. (Key No.)* § 264; *Cent. Dig.* § 608.

<sup>45</sup> *Foster v. Hall*, 4 Humph. (Tenn.) 346. See "*Partnership*," *Dec. Dig. (Key No.)* § 264; *Cent. Dig.* § 614.

<sup>46</sup> *Barber v. Barnes*, 52 Cal. 650; *Choppin v. Wilson*, 27 La. Ann. 444. See "*Partnership*," *Dec. Dig. (Key No.)* § 264; *Cent. Dig.* § 614.

<sup>47</sup> *Theriot v. Michel*, 28 La. Ann. 107; *Sanders v. Young*, 31 Miss. 111; *Morrison v. Blodgett*, 8 N. H. 238, 29 Am. Dec. 653; *Renton v. Chaplain*, 9 N. J. Eq. 62; *Aspinall v. London & Northwestern Ry. Co.*, 11 Hare, 325; *HABERSHON v. BLURTON*, 1 De Gex & S. 121. See "*Partnership*," *Dec. Dig. (Key No.)* § 264; *Cent. Dig.* § 614.

force a dissolution to the disadvantage of some one of the partners.<sup>48</sup> But a conveyance by a member of a mining partnership, because there is no *delectus personarum* in such organizations, even if made to a stranger, does not dissolve the partnership.<sup>49</sup>

### DISSOLUTION BY JUDICIAL DECREE—IMPOSSIBILITY OF SUCCESS

200. A court of equity may dissolve a partnership on the occurrence of events or changes of circumstances which render the continuance of the relation impossible or unprofitable.

Where the partnership is at will, it may be dissolved at any time by any of the partners; and hence there is no occasion to go into court. Where, however, the relationship is for a term, it cannot, according to one line of authorities,<sup>50</sup> be dissolved at the option of any one of the members; and hence a resort to the courts may become necessary. It is clear that this resort must be to a court of equity, as a court of law is not capable of coping with the situation.<sup>51</sup>

The object of all partnerships is profit. Where it is clear that a profit is out of the question, and financial loss must be the inevitable outcome of a continuance of the relation,

<sup>48</sup> *Renton v. Chaplain*, 9 N. J. Eq. 62. See "*Partnership*," *Dec. Dig. (Key No.)* § 264; *Cent. Dig.* § 614.

<sup>49</sup> *Taylor v. Castle*, 42 Cal. 367; *Duryea v. Burt*, 28 Cal. 569; *Skillman v. Lachman*, 23 Cal. 198, 83 Am. Dec. 96; *PATRICK v. WESTON*, 22 Colo. 45, 43 Pac. 446; *Freeman v. Hemenway*, 75 Mo. App. 611-617; *Blissell v. Foss*, 114 U. S. 252, 5 Sup. Ct. 851, 29 L. Ed. 126; *Kahn v. Central Smelting Co.*, 102 U. S. 641, 26 L. Ed. 266. See chapter II, § 36, p. 107. See "*Mines and Minerals*," *Dec. Dig. (Key No.)* § 100; *Cent. Dig.* § 225.

<sup>50</sup> See ante, p. 571.

<sup>51</sup> Story on *Partnership*, § 284; *Nugent v. Locke*, 4 Cal. 320; *Stone v. Fouse*, 3 Cal. 294; *Wilson v. Lassen*, 5 Cal. 116; *Barnstead v. Empire Mining Co.*, 5 Cal. 299; *Mudd v. Bates*, 73 Ill. App. 576. See "*Partnership*," *Dec. Dig. (Key No.)* § 318; *Cent. Dig.* §§ 735-738.

a proper case for the interference of the courts exists.<sup>52</sup> Thus, where the whole scheme on which the partnership is built proves to be visionary, impracticable, or worthless,<sup>53</sup> or a mere "bubble,"<sup>54</sup> or where the patent on which the hopes of the firm had been pinned proves a failure,<sup>55</sup> a dissolution will be decreed. Other examples could be accumulated without difficulty. It has been held that, where a business cannot be carried on according to the true intent of the partnership agreement, the courts will decree a dissolution.<sup>56</sup> A partnership for a whaling voyage was dissolved; it appearing that there was no reasonable prospect of success after the cruise had under many difficulties continued for six months.<sup>57</sup> So the court put an end to the partnership where its combustible property had been burned, its teams had been taken off by an invading army, and the partners were financially in such condition that they could not make the remaining assets profitable.<sup>58</sup>

<sup>52</sup> *Meaher v. Cox*, 37 Ala. 201; *Howell v. Harvey*, 5 Ark. 270, 39 Am. Dec. 376; *Jackson v. Deese*, 35 Ga. 84, 90; *Dunn v. McNaught*, 38 Ga. 179; *Sieghortner v. Weissenborn*, 20 N. J. Eq. 172, 177; *Moles v. O'Neill*, 23 N. J. Eq. 207; *Holladay v. Elliott*, 8 Or. 85; *Page v. Vankirk*, 1 Brewst. (Pa.) 282; *Brown v. Hicks* (D. C.) 8 Fed. 155; *ROSENSTEIN v. BURNS* (C. C.) 41 Fed. 841; *Burns v. Rosenstein*, 135 U. S. 449, 10 Sup. Ct. 817, 34 L. Ed. 193; *Balley v. Ford*, 13 Sim. 495; *Jennings v. Baddeley*, 3 Kay & J. 78; *BARING v. DIX*, 1 Cox, 213, *Gilmore, Cas. Partnership*, 604; *Harrison v. Tennant*, 21 Beav. 482. See "*Partnership*," *Dec. Dig. (Key No.)* § 267; *Cent. Dig.* § 611.

<sup>53</sup> *Lafond v. Deems*, 52 How. Prac. (N. Y.) 41; *Id.*, 1 Abb. N. C. (N. Y.) 318, reversed on other grounds 81 N. Y. 507. See "*Partnership*," *Dec. Dig. (Key No.)* § 267; *Cent. Dig.* § 611.

<sup>54</sup> *Beaumont v. Meredith*, 3 Ves. & B. 181. See "*Partnership*," *Dec. Dig. (Key No.)* § 267; *Cent. Dig.* § 611.

<sup>55</sup> *BARING v. DIX*, 1 Cox, 213, *Gilmore, Cas. Partnership*, 604. See "*Partnership*," *Dec. Dig. (Key No.)* § 267; *Cent. Dig.* § 611.

<sup>56</sup> *Holladay v. Elliott*, 8 Or. 85; *Brien v. Harriman*, 1 Tenn. Ch. 467; *ROSENSTEIN v. BURNS* (C. C.) 41 Fed. 841; *Burns v. Rosenstein*, 135 U. S. 449, 10 Sup. Ct. 817, 34 L. Ed. 193. See "*Partnership*," *Dec. Dig. (Key No.)* § 267; *Cent. Dig.* § 611.

<sup>57</sup> *Brown v. Hicks* (D. C.) 8 Fed. 155. See "*Partnership*," *Dec. Dig. (Key No.)* § 267; *Cent. Dig.* §§ 611.

<sup>58</sup> *Jackson v. Deese*, 35 Ga. 84. See "*Partnership*," *Dec. Dig. (Key No.)* § 267; *Cent. Dig.* § 611.

Where a partnership needed more money to make the business a success, which one of the partners is unwilling and the other unable to advance, or where both were unwilling or unable to advance the necessary funds, a proper case for a dissolution was held to exist.<sup>59</sup>

### SAME—INCAPACITY OR INSANITY OF A PARTNER

**201. A court of equity will dissolve a partnership where a partner is totally incapacitated from performing the partnership duties.**

Where a partner by reason of either bodily or mental infirmities or other reason becomes totally incapacitated from performing his duties as a partner, equity will decree a dissolution, both to protect the partner who is incapacitated as well as to relieve the other partners from the difficult position in which they are thus placed.<sup>60</sup> "It may be laid down as a general rule that when partners are to contribute skill and industry, as well as capital, if one partner becomes unable to contribute that skill, a court of equity ought to interfere for both their sakes."<sup>61</sup> But where the incapacity is but temporary, the court will not pronounce a dissolution, but will wait to see whether any improvement will take place.<sup>62</sup> Nor is the rule confined to sickness. Any other incapacity may have the same effect. Thus the court decreed a dissolution, where a mem-

<sup>59</sup> *Sieghortner v. Weissenborn*, 20 N. J. Eq. 172; *Weissenborn v. Sieghortner*, 21 N. J. Eq. 483; *Jennings v. Baddeley*, 3 Kay & J. 79. See "*Partnership*," *Dec. Dig. (Key No.)* § 267; *Cent. Dig.* § 611.

<sup>60</sup> *Barclay v. Barrie*, 64 Misc. Rep. 403, 119 N. Y. Supp. 463; *Casky v. Casky*, 5 Ky. Law Rep. 775; *Page v. Vankirk*, 1 Brewst. (Pa.) 232; *Leaf v. Coles*, 1 De Gex, M. & G. 174, 12 Eng. L. & Eq. 117; *Sayer v. Bennet*, 1 Cox, 107; *Anonymous*, 2 Kay & J. 441. See "*Partnership*," *Dec. Dig. (Key No.)* § 274; *Cent. Dig.* § 621.

<sup>61</sup> *Sayer v. Bennet*, 1 Cox, 109. See "*Partnership*," *Dec. Dig. (Key No.)* § 274; *Cent. Dig.* § 621.

<sup>62</sup> *Whitwell v. Arthur*, 35 Beav. 140. See "*Partnership*," *Dec. Dig. (Key No.)* § 274; *Cent. Dig.* § 621.

ber of a law firm was elected as justice of the peace, since it was shown that the duties of this office required practically all his time.<sup>63</sup>

*Same—Insanity*

This rule as to disability applies with peculiar force to insanity. The insanity of a partner does not operate ipso facto as a dissolution,<sup>64</sup> but the action of the courts must be invoked. "The insanity of a partner is a ground for the dissolution of the partnership, because it is immediate incapacity; but it may not, in the result, prove to be a ground of dissolution, for the partner may recover from his malady. When a partner, therefore, is affected with insanity, the continuing partner may, if he think fit, make it a ground of dissolution; but in that case I consider, with Lord Kenyon, that in order to make it a ground of dissolution he must obtain a decree of the court. If he does not apply to the court for a decree of dissolution, it is to be considered that he is willing to wait to see whether the incapacity of his partner may not prove merely temporary. If he carry on the partnership business in the expectation that his partner may recover from his insanity, so long as he continues the business with that expectation or hope there can be no dissolution."<sup>65</sup> The court will, therefore, not dissolve a partnership if the lunacy is temporary only, with a fair prospect of recovery within a reasonable time,

<sup>63</sup> *Stiles v. Bradley*, 133 App. Div. 508, 117 N. Y. Supp. 637. See "*Partnership*," *Dec. Dig. (Key No.)* § 274; *Cent. Dig.* § 621.

<sup>64</sup> *RAYMOND v. VAUGHN*, 128 Ill. 256, 21 N. E. 566, 4 L. R. A. 444, 15 Am. St. Rep. 112, Gilmore, *Cas. Partnership*, 595; *JURGENS v. ITTMAN*, 47 La. Ann. 367, 16 South. 952; *Anonymous*, 2 Kay & J. 441. There has been vigorous contention to the contrary. T. Parsons, in his book on *Partnership*, § 362, imagines the case of a partner becoming insane, and the other partners, deprived of his sagacity, rush into mad ventures, entailing tremendous liabilities, before any dissolution by the court can be had. In such case, if the partnership is not dissolved ipso facto by insanity, a great hardship would befall the insane partner. *Isler v. Baker*, 6 Humph. (Tenn.) 65; *Robertson v. Lackie*, 15 Sim. 285; *Millerah v. Keen*, 27 Beav. 236. See chapter II, § 24, pp. 83-84. See "*Partnership*," *Dec. Dig. (Key No.)* § 274; *Cent. Dig.* § 621.

<sup>65</sup> *Jones v. Noy*, 2 Mylne & K. 125, 130. See "*Partnership*," *Dec. Dig. (Key No.)* § 274; *Cent. Dig.* § 621.

and so does not materially affect the partner's capacity to discharge his partnership duties.<sup>66</sup> Nor is mere diminution of mental capacity not amounting to insanity sufficient.<sup>67</sup> Where, however, the malady is so serious as to incapacitate the partner for his duties according to the partnership arrangement, the relation will be dissolved,<sup>68</sup> even at the suit of the lunatic or his committee;<sup>69</sup> but the dissolution will be of the date of the decree and will not be retroactive.<sup>70</sup>

### SAME—MISCONDUCT OF PARTNER

**202. A court of equity will dissolve a partnership for gross neglect, misconduct, or breach of duty, but not at the suit of the party who is alone at fault.**

It has been held in a few cases that the desertion of the firm business, or the absconding of a partner, of itself, without any action of a court, dissolves the partnership;<sup>71</sup> but the weight of authority treats this merely as a ground on which the court will dissolve the relation at the suit of the

<sup>66</sup> *RAYMOND v. VAUGHN*, 128 Ill. 256, 21 N. E. 566, 4 L. R. A. 444, 15 Am. St. Rep. 112, Gilmore, Cas. Partnership, 595. See "*Partnership*," Dec. Dig. (Key No.) § 274; Cent. Dig. § 621.

<sup>67</sup> *Sadler v. Lee*, 6 Beav. 324, 331. See "*Partnership*," Dec. Dig. (Key No.) § 274; Cent. Dig. § 621.

<sup>68</sup> *Reynolds v. Austin*, 4 Del. Ch. 24; *RAYMOND v. VAUGHN*, 128 Ill. 256, 21 N. E. 566, 4 L. R. A. 444, 15 Am. St. Rep. 112, Gilmore, Cas. Partnership, 595; *GRISWOLD v. WADDINGTON*, 15 Johns. (N. Y.) 57, Gilmore, Cas. Partnership, 600; *Paige v. Vankirk*, 1 Brewst. (Pa.) 282; *Anonymous*, 2 Kay & J. 441; *Sadler v. Lee*, 6 Beav. 324, 331; *Sayer v. Bennet*, 1 Cox, 107; *Leaf v. Coles*, 1 De Gex, M. & G. 171; *Sander v. Sander*, 2 Coll. 276. See "*Partnership*," Dec. Dig. (Key No.) § 274; Cent. Dig. § 621.

<sup>69</sup> *Jones v. Lloyd*, L. R. 18 Eq. 265. See "*Partnership*," Dec. Dig. (Key No.) § 274; Cent. Dig. § 621.

<sup>70</sup> *Besch v. Frollich*, 1 Phil. Ch. 172; *Sander v. Sander*, 2 Coll. 276. See "*Partnership*," Dec. Dig. (Key No.) § 274; Cent. Dig. § 621.

<sup>71</sup> *Beaver v. Lewis*, 14 Ark. 138; *Whitman v. Leonard*, 3 Pick. (Mass.) 177; *Potter v. Moses*, 1 R. I. 430; *Ayer v. Ayer*, 41 Vt. 346. See "*Partnership*," Dec. Dig. (Key No.) §§ 267, 275; Cent. Dig. §§ 611, 620.

remaining partners.<sup>72</sup> The court will require a strong case to be made, and has no jurisdiction to decree a separation for trifling causes or temporary grievances, such as defects of temper, discourtesy, inattentiveness, casual disputes, differences of opinion, errors of judgment, small infractions of the partnership agreement, which do not essentially abstract or destroy the ordinary rights, operations, and interests of the firm.<sup>73</sup> If such defects require any remedy, the court will supply it by acting on the faulty party by injunc-

<sup>72</sup> *Ligare v. Peacock*, 109 Ill. 94; *Burgess v. Badger*, 124 Ill. 288, 14 N. E. 850; *Arnold v. Brown*, 24 Pick. (Mass.) 89, 35 Am. Dec. 296; *Denver v. Roane*, 99 U. S. 355, 25 L. Ed. 476; *Ambler v. Whipple*, 20 Wall. 546, 22 L. Ed. 403; *Master v. Kirton*, 3 Ves. 74. See "*Partnership*," *Dec. Dig. (Key No.)* §§ 267, 273; *Cent. Dig.* §§ 611, 620.

<sup>73</sup> *Howell v. Harvey*, 5 Ark. 270, 39 Am. Dec. 376; *CASH v. EARN-SHAW*, 66 Ill. 402, *Gilmore, Cas. Partnership*, 603; *Gerard v. Gateau*, 84 Ill. 121, 25 Am. Rep. 438; *Loomis v. McKenzie*, 31 Iowa, 425; *Lafond v. Deems*, 52 How. Prac. (N. Y.) 41; *Id.*, 81 N. Y. 507; *Fischer v. Raab*, 57 How. Prac. (N. Y.) 87; *Richards v. Baurman*, 65 N. C. 162; *Slemmer's Appeal*, 58 Pa. 168, 98 Am. Dec. 255; *Page v. Vankirk*, 1 Brewst. (Pa.) 282, 284; *SLOAN v. MOORE*, 37 Pa. 217, *Gilmore, Cas. Partnership*, 231; *Wray v. Hutchinson*, 2 Mylne & K. 235; *Goodman v. Whitcomb*, 1 Jac. & W. 589, 593; *Anderson v. Anderson*, 25 Beav. 190.

In *Howell v. Harvey*, *supra*, the court said: "The jurisdiction of a court of equity in cases of copartnership, flowing from the peculiar trusts and duties growing out of that connection, is of the most extensive and beneficial character. It often declares partnerships utterly void in case of fraud, imposition, and oppression in the original agreement, or decrees a dissolution of a partnership which was unobjectionable in its origin, but which subsequent causes have rendered onerous and oppressive. Gross misconduct, want of good faith, or criminal want of diligence, or such cause as is productive of serious and permanent injury in the partnership concerns, or renders it impracticable to carry on the business, is good ground for a dissolution at the suit of the injured partner. Habitual drunkenness, great extravagance, or unwarrantable negligence in conducting the business of the partnership justifies a dissolution; but then it must be a strong and clear case of positive or meditated abuse to authorize such a decree. For minor misconduct and grievances, if they require redress, the court will interfere by way of injunction, to prevent the mischief." See "*Partnership*," *Dec. Dig. (Key No.)* §§ 118, 267, 272, 273, 324; *Cent. Dig.* §§ 181, 611, 619, 620, 755.

tion.<sup>74</sup> Where, however, the infractions are of a more serious nature, amounting to gross misconduct, want of good faith, or criminal want of diligence, so as to render it impracticable to carry on the firm business, a proper case for the action of the courts exists.<sup>75</sup> Thus habitual intoxication, extravagance, and dishonesty,<sup>76</sup> willful and persistent neglect of the defendants to comply with the terms of the partnership agreement,<sup>77</sup> wrongful exclusion of a partner from the business,<sup>78</sup> fraudulent failure to keep proper ac-

<sup>74</sup> *Sieghortner v. Weissenborn*, 20 N. J. Eq. 172, and cases cited in previous note. "The general rules of law concerning injunction in partnership cases are the same that obtain in any other case. Courts of equity are authorized in any cause to interfere by injunction to prevent irreparable injury or loss." See chapter VIII, § 171, p. 514 et seq. Note in 98 Am. St. Rep. 267. See "*Partnership*," *Dec. Dig. (Key No.)* §§ 118, 267, 272, 273, 324; *Cent. Dig.* §§ 181, 611, 619, 620, 755.

<sup>75</sup> *Meaher v. Cox*, 37 Ala. 201; *Howell v. Harvey*, 5 Ark. 270, 39 Am. Dec. 376; *Gerard v. Gateau*, 84 Ill. 121, 25 Am. Rep. 438; *Kennedy v. Kennedy*, 3 Dana (Ky.) 239; *Sieghortner v. Weissenborn*, 20 N. J. Eq. 172; *SUTRO v. WAGNER*, 23 N. J. Eq. 388, *Gillmore, Cas. Partnership*, 483; *Wagner v. Sutro*, 24 N. J. Eq. 589; *Singer v. Heller*, 40 Wis. 544, 547; *Wood v. Beath*, 23 Wis. 254; *Gaddie v. Mann (C. C.)* 147 Fed. 960; *Harrison v. Tennant*, 21 Beav. 503; *Smith v. Jeyes*, 4 Beav. 503; *Cheeseman v. Price*, 35 Beav. 142; *Waters v. Taylor*, 2 Ves. & B. 299. See "*Partnership*," *Dec. Dig. (Key No.)* §§ 272, 273; *Cent. Dig.* §§ 619, 620.

<sup>76</sup> *Ambler v. Whipple*, 20 Wall. 546, 22 L. Ed. 403; Cf. *Krigbaum v. Vindquest*, 10 Neb. 435, 6 N. W. 631. See "*Partnership*," *Dec. Dig. (Key No.)* §§ 272-274; *Cent. Dig.* §§ 619-621.

<sup>77</sup> *ROSENSTEIN v. BURNS (C. C.)* 41 Fed. 841. See "*Partnership*," *Dec. Dig. (Key No.)* § 273; *Cent. Dig.* § 620.

<sup>78</sup> *Moore v. Price*, 116 Ala. 247, 22 South. 531; *Heyman v. Heyman*, 210 Ill. 524, 71 N. E. 591; *Havener v. Stephens*, 58 S. W. 372, 22 Ky. Law Rep. 498; *Kennedy v. Kennedy*, 3 Dana (Ky.) 239; *Groth v. Payment*, 79 Mich. 290, 44 N. W. 611. *Major v. Todd*, 84 Mich. 85, 47 N. W. 841; *Beller v. Murphy*, 139 Mo. App. 663, 123 S. W. 1029; *Hartman v. Woehr*, 18 N. J. Eq. 383; *Wilcox v. Pratt*, 52 Hun, 340, 5 N. Y. Supp. 361; *Holder v. Shelby (Tex. Civ. App.)* 118 S. W. 590; *Cole v. Price*, 22 Wash. 18, 60 Pac. 153; *Redding v. Anderson*, 37 Wash. 209, 79 N. W. 628; *Werner v. Lelsen*, 31 Wis. 170; *Wood v. Beath*, 23 Wis. 254, 260; *Goodman v. Whitcomb*, 1 Jac. & W. 589, 593; *Newton v. Doran*, 1 Grant, V. C. 590; *Wimbly v. Clark*, 22 Quebec Super. Ct. 453. See "*Partnership*," *Dec. Dig. (Key No.)* § 273; *Cent. Dig.* § 620.

counts,<sup>79</sup> or misappropriation of the funds in the hands of the firm,<sup>80</sup> have been held to be proper causes for dissolution. As will readily be seen, the line between trifling grievances and gross misconduct is not very clearly defined, but is rather a matter of degree, and in fact depends on all the circumstances of the particular case, such as the character of the partners and the business in which they are engaged. The determining question in every case must be: Do the acts complained of prevent the profitable continuance of the business on the terms of the partnership agreement?<sup>81</sup> It is obvious that under proper conditions a dissolution will be decreed on the suit of the innocent party. But even if both parties are in fault, if conditions have become intolerable and a continuance of the business must be unprofitable, the courts will decree a dissolution, though defendant claims to be the party least in fault and resists the action.<sup>82</sup> The courts will pursue this course, rather than undertake "the high prerogative of decreeing a personal reconciliation and restoration of mutual confidence." Thus, where dissensions in the natural course of events have produced chronic hostility between the parties, so that they work against instead of for each other, the court will dissolve the firm at the suit of any one of them.<sup>83</sup>

<sup>79</sup> *Werner v. Leisen*, 31 Wis. 169; *Wood v. Beath*, 23 Wis. 254; *Cheeseman v. Price*, 35 Beav. 142; *Gowan v. Jeffries*, 2 Ashu. 296. See "*Partnership*," *Dec. Dig. (Key No.)* § 273; *Cent. Dig.* § 620.

<sup>80</sup> *Dumont v. Ruepprecht*, 38 Ala. 175, 179; *Cottle v. Leitch*, 35 Cal. 434; *Maher v. Bull*, 44 Ill. 97, 99; *Adams v. Shewalter*, 139 Ind. 178, 38 N. E. 607; *Hanna v. McLaughlin*, 158 Ind. 292, 63 N. E. 475; *Flammer v. Green*, 47 N. Y. Super. Ct. 538; *Reiter v. Morton*, 96 Pa. 229; *Hubbard v. Moore*, 67 Vt. 532, 32 Atl. 465; *Smith v. Jeyes*, 4 Beav. 503; *Cheeseman v. Price*, 35 Beav. 142. See "*Partnership*," *Dec. Dig. (Key No.)* § 273; *Cent. Dig.* § 620.

<sup>81</sup> *Page v. Vankirk*, 1 Brewst. (Pa.) 282; *Id.*, 6 Phila. 264. See "*Partnership*," *Dec. Dig. (Key No.)* § 273; *Cent. Dig.* § 620.

<sup>82</sup> *Boyd v. Mynatt*, 4 Ala. 79; *Blake v. Dorgan*, 1 G. Greene (Iowa) 537; *Stevens v. Yeatman*, 19 Md. 480; *Ferrero v. Buhlmeier*, 34 How. Prac. (N. Y.) 33; *Atwood v. Maude*, 3 Ch. Div. 369, 373; *Baxter v. West*, 1 Drew. & S. 173, 175. See "*Partnership*," *Dec. Dig. (Key No.)* §§ 272, 273, 317; *Cent. Dig.* §§ 619, 620, 733.

<sup>83</sup> *Gerard v. Gateau*, 84 Ill. 121, 25 Am. Rep. 438; *Blake v. Dorgan*, 1 G. Greene (Iowa) 537; *Whitman v. Robinson*, 21 Md. 30;

Where, however, one partner is entirely at fault, he will not be allowed to build up a cause of action on his own wrong and thus procure a dissolution.<sup>84</sup>

### ANNULMENT OF PARTNERSHIP

**203. In cases of fraud, imposition, and oppression in the original agreement, the partnership may be declared void ab initio.**

Declaring a partnership void ab initio is quite different from merely dissolving it. The distinction is very much the same as between a divorce and an annulment of a marriage. Where a divorce is procured, the marriage is recognized as valid. An annulment, however, declares that it never existed. Equally a dissolution of a partnership recognizes that a partnership has existed. A decree declaring the partnership void ab initio, on the other hand, wipes the relation out of existence retroactively so far as the partners are concerned. It is obvious that a partnership may be dissolved by the court at the instance of the innocent party, where it has been induced by fraud.<sup>85</sup> Thus, where the purpose of the partnership was to buy a patent right, and

*Bishop v. Breckles*, 1 Hoff. Ch. (N. Y.) 534; *Lafond v. Deems*, 52 How. Prac. (N. Y.) 41; *Id.*, 1 Abb. N. C. (N. Y.) 318, reversed on other grounds 81 N. Y. 507; *Philipp v. Von Raven*, 26 Misc. Rep. 552, 57 N. Y. Supp. 701; *Singer v. Heller*, 40 Wis. 544; *Watney v. Wells*, 30 Beav. 56; *Leary v. Shout*, 33 Beav. 583; *Baxter v. West*, 1 Drew. & S. 173; *Harrison v. Tennant*, 21 Beav. 482. See "*Partnership*," *Dec. Dig. (Key No.)* §§ 272, 273; *Cent. Dig.* §§ 619, 620.

<sup>84</sup> *Gerard v. Gateau*, 84 Ill. 121, 25 Am. Rep. 438; *Harrison v. Tennant*, 21 Beav. 482; *Fairthorne v. Weston*, 2 Hare, 387, 392. See "*Partnership*," *Dec. Dig. (Key No.)* §§ 272, 273; *Cent. Dig.* §§ 619, 620.

<sup>85</sup> *Fogg v. Johnston*, 27 Ala. 432, 62 Am. Dec. 771; *Howell v. Harvey*, 5 Ark. 270, 39 Am. Dec. 376; *White v. Smith*, 63 Ark. 513, 39 S. W. 555; *ROSENSTEIN v. BURNS* (C. C.) 41 Fed. 841; *Burns v. Rosenstein*, 135 U. S. 449, 10 Sup. Ct. 817, 34 L. Ed. 193; *Mycok v. Beatson*, 13 Ch. Div. 384; *Jauncy v. Knowles*, 29 L. J. Ch. 91, 1 L. T. 116, 8 W. R. 69. See "*Partnership*," *Dec. Dig. (Key No.)* §§ 25, 273, 276, 315; *Cent. Dig.* §§ 11, 620, 623, 731.

one of the partners obtained a secret advantage from the vendor of the same for the influence which he had exerted on his partners in forming the partnership for this purpose, the relation was dissolved.<sup>86</sup> And a dissolution was decreed, where one of the partners had misrepresented his skill as a machinist and engineer, thus inducing the plaintiff to enter into the agreement. It was held that the aggrieved party may, if the equities of the case require it, obtain the dissolution as of the date on which he abandoned the enterprise, after giving due notice to his copartners.<sup>87</sup>

The courts, however, go farther, and in a proper case will rescind the contract *ab initio* and put the innocent party or parties in statu quo as near as can be done. The party aggrieved has a right to have the agreement wholly set aside, and may take the stand that the misrepresentations vitiate the contract.<sup>88</sup> Thus, where the plaintiff was induced to enter the partnership by the fraudulent alteration of the defendants' books and by other devices, the court annulled the contract of partnership and said: "The effect of Todd's election to avoid the contract of partnership for the fraud practiced on him is that, as between the parties, there has never existed any copartnership. All the business, though in the name of the firm, was for the benefit and at the risk of Richards. It is just that Todd should receive a reasonable compensation for his time thus spent in the service of and for the benefit of Richards. \* \* \* It is also clear that as Todd, by holding himself out as a member of a firm, rendered himself liable to the creditors of such apparent firm, Richards should, in order to place him in statu quo, indemnify him against the claims of such creditors."<sup>89</sup> It is quite clear from the statement that an

<sup>86</sup> *White v. Smith*, 63 Ark. 513, 39 S. W. 555. See "*Partnership*," *Dec. Dig.* (Key No.) §§ 25, 273; *Cent. Dig.* §§ 11, 620.

<sup>87</sup> *Fogg v. Johnston*, 27 Ala. 432, 62 Am. Dec. 771. See "*Partnership*," *Dec. Dig.* (Key No.) § 273; *Cent. Dig.* § 620.

<sup>88</sup> *HARLOW v. LA BRUM*, 151 N. Y. 278, 45 N. E. 859, affirming 82 Hun, 292, 31 N. Y. Supp. 487. See "*Partnership*," *Dec. Dig.* (Key No.) § 25; *Cent. Dig.* § 11.

<sup>89</sup> *Richards v. Todd*, 127 Mass. 169. See, also, *Charlesworth v.*

annulment of the contract ab initio is a far better remedy to the defrauded party than a mere dissolution could be. Hence this remedy has been quite frequently invoked.<sup>90</sup> It should be noted, however, that the courts will not annul the partnership agreement for any light reason, such as mere puffing of the prospect of the venture or exaggeration of the value of the property put into the business.<sup>91</sup> Where, however, the misrepresentation has been material,<sup>92</sup> though not necessarily sufficient to give an action for deceit,<sup>93</sup> the courts may dissolve the relation ab initio. But where a partner, after knowledge of the fraud, has recognized the fraudulent partnership contract as valid, the courts will not decree a rescission.<sup>94</sup>

Jennings, 34 Beav. 96. See "*Partnership*," Dec. Dig. (Key No.) §§ 25, 315; Cent. Dig. §§ 11, 731.

<sup>90</sup> Hynes v. Stewart, 10 B. Mon. (Ky.) 429; SMITH v. EVERETT, 126 Mass. 304, Gilmore, Cas. Partnership, 608; Perry v. Hale, 143 Mass. 540, 10 N. E. 174; Gibson v. Cunningham, 92 Mo. 131, 5 S. W. 12; Hunter v. Whitehead, 42 Mo. 524; HARLOW v. LA BRUM, 82 Hun, 292, 31 N. Y. Supp. 487, affirmed 151 N. Y. 278, 45 N. E. 859; More v. Rand, 60 N. Y. 208; Hollister v. Simonson, 36 App. Div. 63, 55 N. Y. Supp. 372; Kimmins v. Wilson, 8 W. Va. 584; Oteri v. Scalzo, 145 U. S. 578, 588, 12 Sup. Ct. 895, 36 L. Ed. 824; Newbigging v. Adam, 34 Ch. Div. 582. Jennings v. Broughton, 17 Beav. 23, affirmed 5 De Gex, M. & G. 125; Hamill v. Stokes, 4 Price, 161; Andrewes v. Garstin, 10 Com. Bench. N. S. 444; Stainbank v. Fernley, 9 Sim. 556; Rawlins v. Wickham, 1 Giff. 355, 3 De Gex & J. 304; Colt v. Wollasten, 2 P. Wms. 154; Green v. Barrett, 1 Sim. 45; Pillans v. Harkness, Colles, 442; Redgrave v. Hurd, 20 Ch. Div. 1. See "*Partnership*," Dec. Dig. (Key No.) §§ 25, 315; Cent. Dig. §§ 11, 731.

<sup>91</sup> Gerard v. Gateau, 84 Ill. 121, 25 Am. Rep. 438; Jennings v. Broughton, 17 Beav. 234, affirmed 5 De Gex, M. & G. 126. See "*Partnership*," Dec. Dig. (Key No.) §§ 25, 273, 315; Cent. Dig. §§ 11, 620, 731.

<sup>92</sup> Rawlins v. Wickham, 1 Giff. 355, 3 De Gex & J. 304. See "*Partnership*," Dec. Dig. (Key No.) §§ 25, 273, 315; Cent. Dig. §§ 11, 620, 731.

<sup>93</sup> Newbigging v. Adam, 34 Ch. Div. 582. See "*Partnership*," Dec. Dig. (Key No.) §§ 25, 273, 315; Cent. Dig. §§ 11, 620, 731.

<sup>94</sup> St. John v. Hendrickson, 81 Ind. 350; Evans v. Montgomery, 50 Iowa, 325; Andriessen's Appeal, 123 Pa. 303, 16 Atl. 840; Riddel v. Smith, 10 L. T. 561, 12 W. R. 899. See "*Partnership*," Dec. Dig. (Key No.) §§ 25, 273, 315; Cent. Dig. §§ 11, 620, 731.

## CHAPTER XI

## LIMITED PARTNERSHIPS

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## GENERAL NATURE—DEFINITION

204. A limited partnership is a partnership, authorized by statute, in which the liability of one or more, but not all, of the partners is limited to the amount contributed by him or them to the firm capital at the time of the formation of the partnership.

### History

Limited partnerships are wholly unknown to the common law both of England<sup>1</sup> and of the United States,<sup>2</sup> and are a form of association borrowed from the civil law of France.

They are created only by statute, and exist and are controlled entirely by legislative enactments.<sup>3</sup> In France and Italy these limited partnerships, called "partnerships in commendam," were known as far back as the Middle Ages,<sup>4</sup> and seem to have arisen out of the necessity of finding some method by which the nobles and rich clergy could make use of their accumulated wealth in trade for the mutual advantage of both themselves and the trader, but without either taking an active part in the business or subjecting themselves to any liability beyond their original investment. They are in reality a sort of quasi corporation,<sup>5</sup> and form a step half way between the partnership universally recognized at common law, in which each and every partner is liable in solido for the debts of the firm, and the modern corporation, in which all shareholders are liable only to the extent of their original investment.

In England, curiously enough, the continental<sup>6</sup> law of limited partnerships never gained a foothold in the common law, and, although recognized by many statutes to the ex-

<sup>1</sup> *Cooke v. Eyre*, 1 H. Bl. 37. See "*Partnership*," *Dec. Dig. (Key No.)* §§ 349-376; *Cent. Dig.* §§ 823-865; "*Joint-Stock Companies*," *Dec. Dig. (Key No.)* §§ 1-24; *Cent. Dig.* §§ 1-33.

<sup>2</sup> *AMES v. DOWNING*, 1 Bradf. Sur. (N. Y.) 321, Gilmore, Cas. Partnership, 610; *CLAPP v. LACEY*, 35 Conn. 463; *PIERCE v. BRYANT*, 5 Allen (Mass.) 91; *SINGER v. KELLY*, 44 Pa. 145; *Henkel v. Heyman*, 91 Ill. 101; *MANHATTAN CO. v. LAIMBEER*, 108 N. Y. 578, 15 N. E. 712, Gilmore, Cas. Partnership, 615. See "*Partnership*," *Dec. Dig. (Key No.)* §§ 349-376; *Cent. Dig.* §§ 823-865; "*Joint-Stock Companies*," *Dec. Dig. (Key No.)* §§ 1-24; *Cent. Dig.* §§ 1-33.

<sup>3</sup> *CLAPP v. LACEY*, 35 Conn. 463; *Lancaster v. Choate*, 5 Allen (Mass.) 530. See "*Partnership*," *Dec. Dig. (Key No.)* § 366; *Cent. Dig.* § 859.

<sup>4</sup> Sir Frederick Pollock's *Essays on Jurisprudence*.

<sup>5</sup> *Hayes v. Bement*, 3 Sandf. (N. Y.) 397; *Whittemore v. MacDonnell*, 6 U. C. C. P. 551. See "*Partnership*," *Dec. Dig. (Key No.)* § 349; *Cent. Dig.* § 823.

tent of permitting joint-stock companies with limited liability,<sup>6</sup> it was not until 1907 that true limited partnerships were authorized by statute, and even these differ from those of the United States in some particulars, especially in requiring the large number of 10 partners for banking firms and 20 for other sorts.<sup>7</sup>

In the United States limited partnerships existed from earliest times in Louisiana, which was originally a colony of France,<sup>8</sup> and undoubtedly also existed in Florida so long as that state remained a colony of Spain; but Florida in 1822 adopted the English common law as it existed down to the fourth year of James I as the basis of its jurisprudence,<sup>9</sup> and in 1838 passed a statute modeled after that of New York. In the last codification of the Florida laws this statute has, however, been omitted, so that to-day Florida does not recognize limited partnerships.

Of the English colonies, which, as we have seen, did not inherit limited partnerships from the mother country, New York and Connecticut were the first to sanction them by statute. Both of these states passed statutes in the same year, 1822, New York on April 17th and Connecticut on May 29th. These statutes are very similar, although the courts of the latter state strenuously deny that its statute is in any way copied from New York,<sup>10</sup> but insist that both were derived from the French law.

The New York statutes were revised in 1829. The revision is based on a report of commissioners made November 2, 1827. The commissioners were John Duer, B. F. Butler, and John C. Spencer, three eminent lawyers of that day. They entirely recast the statute relating to limited partnerships, added the provisions for filing affidavits of publication and the provisions as to fraudulent preferences, changed the provision as to dissolution so as to require publication of notice, forbade the use of the words "and

<sup>6</sup> 21 and 22 Vict. c. 91.

<sup>7</sup> An Act to Establish Limited Partnerships, 7 Edw. VII, c. 24.

<sup>8</sup> Louisiana: Civ. Code 1825, arts. 2799, 2810-2822; Civ. Code 1900, arts. 2828, 2839-2851.

<sup>9</sup> Hart v. Bostwick, 14 Fla. 162, 173.

<sup>10</sup> CLAPP v. LACEY, 35 Conn. 463.

company" in the firm name, and made other minor changes. Their report on this subject was adopted by the Legislature without any important change, except for striking out a declaratory section that dissolution should not affect the liability of the partnership and its members to persons with whom they had had dealings, who had no actual notice of the dissolution.

This statute, as appearing in the New York Revised Statutes of 1829, was soon re-enacted in almost all of the existing states.<sup>11</sup>

#### ESTABLISHMENT OF THE RELATION—STATUTORY AUTHORITY

**205. A limited partnership can exist only by authority of statute. In addition to the essentials of an ordinary partnership, all the requirements of the statute must be observed.**

A limited partnership must consist of one or more partners, whose liability is limited, and who are called "special partners," and one or more general partners, who are intrusted with the management of the business and are liable in solido for the debts of the firm, exactly as if there were no special partners. Within the limits prescribed by the statutes the partners may make such terms and conditions of partnership as they choose, and their agreement with each other is governed by the general rules applicable to partnership contracts;<sup>12</sup> for a limited partnership is not regarded as an anomaly, but rather as a different variety of ordinary partnership.<sup>13</sup> The elements of ordinary part-

<sup>11</sup> Among the earliest were Massachusetts, March 10, 1835; Pennsylvania, March 21, 1836; New Jersey, February 9, 1837; Michigan, March 18, 1837; Virginia, March 29, 1837; Mississippi, Feb. 15, 1838; Vermont, Rev. St. 1839; Ohio, January 24, 1846; Illinois, February 23, 1847; Kentucky, February 26, 1850; New Hampshire, July 13, 1855; and Indiana, March 5, 1859.

<sup>12</sup> *Nutting v. Ashcroft*, 101 Mass. 300. See "*Partnership*," *Dec. Dig.* (Key No.) §§ 349-376; *Cent. Dig.* §§ 823-865.

<sup>13</sup> *AMES v. DOWNING*, 1 Bradf. Sur. (N. Y.) 321, 328, Gilmore.

nership must exist,<sup>14</sup> and in addition the requirements of the statute must be complied with, and any failure to comply with the statutory requirements, either as to original formation<sup>15</sup> or subsequent conduct of the business,<sup>16</sup> results in a general partnership, and imposes the full common-law liability on all parties, except in a few cases of estoppel<sup>17</sup> and of acts done subsequent to the formation by one special partner without the knowledge and consent of other special partners.

### *Competency of Parties*

Any person having the capacity to contract may be either a general or a special partner, and as the contracts of an infant are only voidable, and not void, the fact that one of the partners is an infant will not make the partnership invalid, so long as it does not appear that he has avoided his contract.<sup>18</sup>

Married women, when their disability has been removed by statute, may, as we have seen, be partners in a general partnership, though ordinarily not with their husbands, and there seems to be no reason why they may not similarly be special partners.<sup>19</sup>

Cas. Partnership, 610; *Marshall v. Lambeth*, 7 Rob. (La.) 471; *Safe Deposit & Trust Co. v. Cahn*, 102 Md. 530, 545, 62 Atl. 819; *Lancaster v. Choate*, 5 Allen (Mass.) 530. See "*Partnership*," *Dec. Dig. (Key No.)* § 349; *Cent. Dig.* § 823.

<sup>14</sup> *Richardson v. Carlton*, 109 Iowa, 515, 80 N. W. 532. See "*Partnership*," *Dec. Dig. (Key No.)* § 349; *Cent. Dig.* § 823.

<sup>15</sup> *Hotopp v. Huber*, 160 N. Y. 524, 55 N. E. 206. See "*Partnership*," *Dec. Dig. (Key No.)* §§ 362, 371; *Cent. Dig.* §§ 842, 843.

<sup>16</sup> *Farnsworth v. Boardman*, 131 Mass. 115. See "*Partnership*," *Dec. Dig. (Key No.)* § 362; *Cent. Dig.* §§ 842, 850.

<sup>17</sup> *TRACY v. TUFFLY*, 134 U. S. 212, 227, 10 Sup. Ct. 527, 33 L. Ed. 879; *Allegheny Nat. Bank v. Bailey*, 147 Pa. 111, 23 Atl. 439. See "*Partnership*," *Dec. Dig. (Key No.)* § 365; *Cent. Dig.* § 845.

<sup>18</sup> *CONTINENTAL NAT. BANK OF BOSTON v. STRAUSS*, 137 N. Y. 148, 32 N. E. 1066; *Jonau v. Blanchard*, 2 Rob. (La.) 513. See "*Partnership*," *Dec. Dig. (Key No.)* § 353; *Cent. Dig.* § 827; "*Infants*," *Dec. Dig. (Key No.)* § 54; *Cent. Dig.* §§ 132-134.

<sup>19</sup> *BERNARD & LEAS MFG. CO. v. PACKARD*, 64 Fed. 309, 12 C. C. A. 123. See chapter II, § 24, p. 85, ante. See "*Husband and Wife*," *Dec. Dig. (Key No.)* §§ 42, 97; *Cent. Dig.* §§ 225, 373.

*Present Statutes—In General*

At the present time statutes on the subject of limited partnership are in force in all the American states, territories, and dependencies, except Arizona, Florida, Oklahoma, Porto Rico, and the Philippines. These statutes, as well as those of the Canadian provinces, are referred to in the note below.<sup>20</sup>

The earlier statutes followed the language of the New York Revised Statutes of 1829 almost as closely as if they had been recommended by a commission on uniformity of legislation; but by occasional amendments and more fre-

<sup>20</sup> *Alabama*: Civ. Code 1907, §§ 5265-5289.

*Alaska*: Carter's Ann. Codes 1900, pp. 423-425, pt. 5, c. 32.

*Arkansas*: Kirby's Dig. 1904, c. 121, §§ 5803-5830.

*California*: Kerr's Codes, vol. 2 (Civ. Code [Pocket Ed.] 1909) §§ 2477-2510.

*Colorado*: Rev. St. 1908, c. 105, §§ 4768-4788.

*Connecticut*: Gen. St. 1902, §§ 4016-4024.

*Delaware*: Rev. Code 1893 (Rev. Code 1852, amended to 1893) c. 64, §§ 1-9.

*District of Columbia*: Code March 3, 1901 (Ed. 1906) §§ 1498-1528.

*Georgia*: Code 1895, vol. 2, §§ 2662-2685.

*Hawaii*: Rev. Laws 1905, c. 161, §§ 2630-2652.

*Idaho*: Rev. Codes 1908, §§ 3336-3360.

*Illinois*: Hurd's Rev. St. 1908, c. 84.

*Indiana*: Burns' Ann. St. (Revision of 1908) c. 118, §§ 9693-9711.

*Iowa*: Code 1897, §§ 3106-3121; Code Supp. 1907, p. 784, § 3109.

*Kansas*: Gen. St. 1905, c. 74, §§ 4766, 4786.

*Kentucky*: Russell's St. 1909, §§ 2490-2501, § 2098.

*Louisiana*: Merrick's Rev. Civ. Code 1900, arts. 2839-2852.

*Maine*: Rev. St. 1903, c. 35.

*Maryland*: Code Pub. Gen. Laws (Poe, 1904) art. 73; also article 27, § 176.

*Massachusetts*: Rev. Laws 1902, vol. 1, c. 71.

*Michigan*: Comp. Laws (Miller, 1907) c. 159, §§ 6055-6078.

*Minnesota*: Rev. Laws 1905, c. 57, §§ 2819-2837.

*Mississippi*: Code 1906, c. 88, §§ 3129-3146.

*Missouri*: Act June 1, 1909, pp. 705-708.

*Montana*: Civ. Code 1907, §§ 5510-5534.

*Nebraska*: Cobbe's Ann. St. 1907, §§ 9700-9727.

*Nevada*: Cutting's Comp. Laws 1900, §§ 2773-2785.

*New Hampshire*: Pub. St. 1901, c. 122.

*New Jersey*: Pub. Laws 1837, p. 121, Feb. 9, and supplementals approved March 15, 1859 (P. L. 1859, p. 335), April 2, 1869 (P. L. 1869 p. 1224), March 26, 1888 (P. L. 1888, p. 265), and March 13,

quent revisions slight differences have arisen. The chapter in the California code was framed on a slightly different plan, and its provisions have been followed closely in Hawaii, Idaho, Montana, North and South Dakota, and Wyoming. In Montana the statute is especially clearly and succinctly phrased. Other important variations from the type are found in the statute of the District of Columbia, which is largely based on that of Maryland, and in Georgia and Massachusetts; and various special provisions of some originality appear in Indiana, Mississippi, New Jersey, New York, North Carolina, Ohio, Pennsylvania, and Virginia.

1901 (P. L. 1901, p. 74, c. 43); Gen. St. 1895, vol. 2, pp. 2437-2440. Cf. P. L. 1880, p. 304 (March 12), and P. L. 1883, p. 188 (March 23).

*New Mexico:* Comp. Laws 1897, §§ 2658-2676.

*New York:* Partnership Law (Laws 1909, c. 44 [Consol. Laws, c. 39]), §§ 30-42.

*North Carolina:* Pell's Revisal 1908, vol. 1, §§ 2521-2539.

*North Dakota:* Rev. Codes 1905, §§ 5865-5889, 9011.

*Ohio:* Bates' Ann. St. (6th Ed., 1908) vol. 2, §§ 3141-3161; vol. 3, § 7077.

*Oregon:* Ball. & Cot. Comp. St. 1902, vol. 2, §§ 4393-4402.

*Panama and Canal Zone:* Civ. Code (transl. by Joannini) 1905, arts. 2087-2089, 2096.

*Pennsylvania:* Purdon's Dig. (13th Ed., 1903) vol. 2, pp. 2023-2030, 2299, 2305; volume 3, pp. 3464-3467 (Act March 21, 1836 [P. L. 143]; Act April 21, 1858 [P. L. 383]; Resolution April 16, 1838 [P. L. 691]; Act March 30, 1865 [P. L. 46]; Act Feb. 21, 1868 [P. L. 42]; Act June 2, 1874 [P. L. 271]; Act May 9, 1899 [P. L. 261]; Act June 27, 1889, § 21; Act July 9, 1901, § 2; Act April 3, 1903; Act April 14, 1905; Act April 17, 1905 [P. L. 186]; Act June 7, 1907 [P. L. 432]; Act May 3, 1909 [P. L. 386]).

*Rhode Island:* Gen. Laws 1909, c. 186.

*South Carolina:* Civ. Code (Code of Laws 1902, vol. 1) c. 39, §§ 1680-1707.

*South Dakota:* Civ. Code (Comp. Laws 1910, vol. 2) §§ 1768-1792; Penal Code, §§ 420, 435.

*Tennessee:* Shannon's Code 1896, §§ 3119-3141a.

*Texas:* Sayles' Ann. Civ. St. 1897, vol. 2, arts. 3583-3606.

*Utah:* Comp. Laws 1907, §§ 1687-1707.

*Vermont:* P. S. 1906, c. 207, §§ 4891-4901.

*Virginia:* Code 1904, vol. 2, §§ 2863-2876.

*Washington:* Rem. & Bal. Code 1910, vol. 2, §§ 8359-8368.

*West Virginia:* Code 1906, §§ 3456-3467.

*Wisconsin:* St. 1898, §§ 1703-1724.

*Wyoming:* Comp. St. 1910, §§ 3397-3421.

The statutes of the civil law jurisdictions, Louisiana and Panama and the Canal Zone, are materially different from the others and much less full. They show that, although the idea of limited partnership was borrowed from the civil law, it was elaborately worked out by statutory methods characteristic of common-law jurisdictions. In Louisiana and the Canal Zone a limited partnership, or partnership in commendam, is not regarded as a different variety of partnership; but partners in commendam are treated as possible incidents of an ordinary partnership.

*Same—Construction of Statutes*

As the statutes are primarily for the benefit of the special partner,<sup>21</sup> in that by limiting his liability they give him a special advantage, it is important that creditors and others dealing with the firm should not be misled or suffer any hardship by reason of this limited liability of one of

CANADA.

*British Columbia*: Rev. St. 1897, vol. 2, c. 150, §§ 47-64.

*Manitoba*: Rev. St. 1902, vol. 2, c. 129, §§ 61-79.

*New Brunswick*: Consol. St. 1877, c. 97, §§ 1-13.

*Newfoundland*: Consol. St. 1892 (2d Series) c. 98.

*Northwest Territories*: Ordinances of N. W. Territories, 1905, c. 94, §§ 47-66 (Alberta Ed.); or Gen. Ord. N. W. Territories, 1905, pp. 917-920, §§ 47-66, and Ordinance of 1899, c. 7 (Saskatchewan Ed.).

*Nova Scotia*: Rev. St. 1884 (5th Series) c. 83, §§ 32-45.

*Ontario*: Rev. St. 1887, c. 151, §§ 1-19.

*Prince Edward Island*: Act April 17, 1862 (25 Vict. c. 13).

*Quebec*: Beauchamp's Civ. Code Ann. 1905, vol. 2, arts. 1871-1887.

The Canadian statutes are not summarized in this chapter. The statute of Ontario, however, is substantially similar to the shorter American statutes on limited partnership, while that of Quebec is apparently an almost literal translation of the chapter on that subject in the New York Revised Statutes of 1829.

In almost all the states the statutes on the subject of limited partnership may be found in a single chapter or article of the latest revision. For this reason it seems to be unnecessary in referring to these statutes to cite in each instance the chapter and section, and reference will therefore be made in the notes to subsequent sections of the chapter to the references in this note.

<sup>21</sup> *Patterson v. Holland*, 7 Grant, Ch. (U. C.) 5; *Durant v. Abendorth*, 41 N. Y. Super. Ct. 53. See "*Partnership*," *Dec. Dig. (Key No.)* §§ 351, 362; *Cent. Dig.* §§ 825, 842.

the partners.<sup>22</sup> Consequently all of the statutes contain provisions intended primarily for the protection of creditors and for securing to all persons interested the fullest knowledge of the firm's standing.

There is, however, considerable conflict upon the question of the construction of the statutes. Some courts take the view that the statute, being derogatory of the common law, should be construed with the utmost strictness, and that in order to secure its protection all of its provisions must be exactly complied with.<sup>23</sup> Other courts, taking the view that the statute is remedial in its nature and should be liberally construed, hold that substantial compliance with its terms is sufficient.<sup>24</sup> But the better view, and the one toward which the courts are now tending,<sup>25</sup> would seem to be that those provisions of the statute which are clearly for the protection of creditors should be strictly complied with,<sup>26</sup> but that a mere formal defect or technical violation of the statute should not make the special part-

<sup>22</sup> *Spalding v. Black*, 22 Kan. 62; *Ulman v. Briggs*, 32 La. Ann. 660; *WHITE v. EISEMAN*, 134 N. Y. 103, 31 N. E. 276; *CONTINENTAL NAT. BANK OF BOSTON v. STRAUSS*, 137 N. Y. 153, 32 N. E. 1066; *Haddock v. Grinnell Mfg. Corp.*, 109 Pa. 372, 1 Atl. 174; *FOURTH ST. NAT. BANK v. WHITAKER*, 170 Pa. 303, 33 Atl. 100. See "*Partnership*," *Dec. Dig. (Key No.)* §§ 362, 371; *Cent. Dig.* §§ 842, 847, 848.

<sup>23</sup> *Holliday v. Union Bag & Paper Co.*, 3 Colo. 342; *PIERCE v. BRYANT*, 5 Allen (Mass.) 91; *Haggerty v. Foster*, 103 Mass. 17; *In re Allen*, 41 Minn. 430, 43 N. W. 382; *Richardson v. Hogg*, 38 Pa. 153. See "*Statutes*," *Dec. Dig. (Key No.)* § 239; *Cent. Dig.* § 320.

<sup>24</sup> *CROUCH v. FIRST NAT. BANK*, 156 Ill. 358, 40 N. E. 974; *Van Riper v. Poppenhausen*, 43 N. Y. 73; *MANHATTAN CO. v. LAIMBEER*, 108 N. Y. 589, 15 N. E. 712, *Gilmore, Cas. Partnership*, 615; *Fifth Ave. Bank v. Colgate*, 120 N. Y. 388, 24 N. E. 799, 8 L. R. A. 712; *WHITE v. EISEMAN*, 134 N. Y. 101, 31 N. E. 276; *Blumenthal v. Whitaker*, 170 Pa. 309, 313, 33 Atl. 103; *Spencer Optical Mfg. Co. v. Johnson*, 53 S. C. 533, 536, 31 S. E. 392. See "*Partnership*," *Dec. Dig. (Key No.)* § 362; *Cent. Dig.* § 842; "*Statutes*," *Dec. Dig. (Key No.)* § 236; *Cent. Dig.* §§ 317, 324, 325.

<sup>25</sup> *Ulman v. Briggs*, 32 La. Ann. 660. See "*Partnership*," *Dec. Dig. (Key No.)* § 362; *Cent. Dig.* § 842.

<sup>26</sup> *Lachaise v. Marks*, 4 E. D. Smith (N. Y.) 610, 626. See "*Partnership*," *Dec. Dig. (Key No.)* § 362; *Cent. Dig.* § 842.

ner liable as a general partner,<sup>27</sup> unless it can be shown that creditors have been misled.<sup>28</sup>

### SAME—PURPOSES

206. Limited partnerships can be formed to engage in only the business authorized by statute. The statutory authority is usually confined to a mercantile, mechanical, or manufacturing business. Most of the statutes prohibit limited partnerships from engaging in insurance or banking.
207. Where a limited partnership is attempted to be formed for an unauthorized or prohibited purpose, an ordinary or general partnership results, and the partners are all liable as general partners.

In the New York Revised Statutes of 1829, which served as a model for most of the American statutes on limited partnership, and in eighteen states to-day,<sup>29</sup> it is provided that a limited partnership may be organized "for the transaction of any mercantile, mechanical or manufacturing business." In twelve of these states,<sup>30</sup> it is expressly provided that these businesses shall not include banking or in-

<sup>27</sup> *Johnson v. McDonald*, 2 Abb. Prac. (N. Y.) 290; *Smith v. Argall*, 6 Hill (N. Y.) 479, affirmed 3 Denio (N. Y.) 435; *Cock v. Bailey*, 146 Pa. 328, 23 Atl. 370; *Blumenthal v. Whitaker*, 170 Pa. 309, 33 Atl. 103. See "*Partnership*," *Dec. Dig. (Key No.)* § 362; *Cent. Dig.* § 842.

<sup>28</sup> *WHITE v. EISEMAN*, 134 N. Y. 103, 31 N. E. 276. See "*Partnership*," *Cent. Dig.* §§ 834, 842.

<sup>29</sup> Arkansas, Delaware, District of Columbia, Kansas, Maine, Michigan, Minnesota, Nebraska, New Jersey, North Carolina, Oregon, Rhode Island, Utah, Vermont, Virginia, Washington, West Virginia, and Wisconsin. For references to the statutes of these states, see note 20, above.

<sup>30</sup> Delaware, Maine, Michigan, Minnesota, New Jersey, North Carolina, Rhode Island, Utah, Vermont, Virginia, West Virginia, and Wisconsin. Virginia and West Virginia also exclude brokerage. North Carolina permits limited partnerships for writing and soliciting, though not for issuing, insurance.

surance. Other states allow a somewhat wider scope.<sup>21</sup> Two states <sup>22</sup> permit the formation of limited partnerships for any lawful business except insurance, and twelve <sup>23</sup> for any business except banking and insurance. This was the provision in the earliest American statutes on the subject.<sup>24</sup> Other states <sup>25</sup> expressly allow the formation of such partnerships for any business whatever, and several <sup>26</sup> impliedly do so, by imposing no restriction.

The attempted formation of a limited partnership for the purpose of carrying on any business not authorized by statute, or the engaging in such unauthorized business at any subsequent time, will render the special partners liable as general partners.<sup>27</sup>

<sup>21</sup> Mississippi: "Any mercantile, commercial, or manufacturing business, or any work of improvement." Maryland: "Any mercantile, mechanical, manufacturing or banking business." South Carolina: "Any mercantile, mechanical or manufacturing business, or for transportation of passengers, products of the soil or merchandise." Kentucky and Pennsylvania: "Any mercantile, agricultural, mechanical or manufacturing business, or for the mining and transportation of coal." Alaska: "Any mercantile, manufacturing or mining business." Nevada: "Any mercantile, mechanical, manufacturing or mining business." Ohio: Similar to Nevada, but expressly excepts banking and insurance. Tennessee: Similar to Ohio, but adds the word "agricultural" to the list. Georgia: "Any mercantile, commercial, mechanical, manufacturing, mining or agricultural business." See references in note 20, above.

<sup>22</sup> Indiana and Massachusetts.

<sup>23</sup> California, Connecticut, Idaho, Missouri, Montana, New Hampshire, New Mexico, New York, North Dakota, South Dakota, Texas, and Wyoming. New Mexico and Texas specify: "Any mercantile, mechanical, manufacturing or other lawful business except banking and insurance." See references in note 20, above.

<sup>24</sup> New York: Laws 1822, c. 244, § 2; Connecticut: Laws 1822, c. 21, § 1.

<sup>25</sup> Alabama and Hawaii. The former mentions "mercantile, mechanical, manufacturing or any other lawful business."

<sup>26</sup> Colorado, Illinois, Iowa, Louisiana, and Panama and Canal Zone. See references in note 20, above.

<sup>27</sup> *McGehee v. Powell*, 8 Ala. 827, where the parties attempted to form a limited partnership to transact a banking business, and were all held as general partners.

Every one dealing with a limited partnership is chargeable with notice as to the scope and range of the business, as set forth in the

## SAME—LOCATION OF BUSINESS

**208.** As the limitation on the liability of special partners exists solely by statute, and as a limited partnership is not a legal entity, it is generally held that such partnerships must carry on business in the state where organized.

In most states <sup>88</sup> a limited partnership may be organized only for the transaction of business within the state. In sixteen states <sup>89</sup> the statute says nothing on this point, and there is apparently no such restriction. Under the law of New Jersey, Pennsylvania, and some other states, "partnership associations," or "partnerships with limited liability," may be organized to do business in any state or country; but these are really joint-stock associations, and not within the scope of this chapter.

It is, however, the general rule, whether expressly so stated in the statute or not, that as the limitation on the liability of special partners exists solely by reason of the statute, and as the limited partnership so formed is not a legal person, as in the case of a corporation, it cannot be formed in one state for the purpose of carrying on business in another, but must carry on its business in the state in

articles, when the same have been filed and made public as required by law. *TAYLOR v. RASCH*, 1 Flip. 385, Fed. Cas. No. 13,800. See "*Partnership*," *Dec. Dig. (Key No.)* §§ 351½, 362; *Cent. Dig.* § 842.

<sup>88</sup> Alabama, Arkansas, Colorado, Delaware, District of Columbia, Georgia, Indiana, Iowa, Kansas, Maryland, Michigan, Minnesota, Missouri, Nebraska, Nevada, New Jersey, New York, North Carolina, Ohio, Pennsylvania, Rhode Island, South Carolina, Tennessee, Utah, Vermont, Virginia, West Virginia, Wisconsin. In Illinois, Oregon, Washington, and Alaska the provision is that limited partnerships may be organized or formed within the state. See references in note 20, above. So in *Laws N. Y. 1822, c. 244, § 1*, and in *Rev. St. N. Y. 1829*.

<sup>89</sup> California, Connecticut, Hawaii, Idaho, Kentucky, Louisiana, Maine, Massachusetts, Mississippi, Montana, New Hampshire, New Mexico, North Dakota, South Dakota, Texas, and Wyoming. So, also, in Panama and the Canal Zone, and under *Laws Conn. 1822, c. 21, § 1*. See references in note 20, above.

which it is formed. There is, however, no objection to the partnership doing business in other jurisdictions, and in such cases it does not appear to be necessary to file any additional papers within those jurisdictions. Where the business is so extended to other jurisdictions, the liability of the special partner depends on the law of the jurisdiction in which the partnership was organized;<sup>40</sup> but proceedings by or against it are governed by the law of the jurisdiction within which they are brought.<sup>41</sup>

### SAME—MEMBERS—GENERAL AND SPECIAL

**209. Limited partnerships must consist of both general and special partners. Some statutes regulate the number of each.**

By the statutes of almost all the states<sup>42</sup> it is expressly provided that the persons other than the general partners shall contribute a part of the capital, that if the statute is complied with they shall not be liable for the debts of the partnership beyond the amount invested, and that they shall have the title of special partners. In Louisiana, under the rule of the civil law, a limited partnership is known as a partnership in commendam, and the special partners

<sup>40</sup> *King v. Sarria*, 69 N. Y. 24, 25 Am. Rep. 128; *Jacquin v. Bulson*, 11 How. Prac. (N. Y.) 385; *Lawrence v. Batcheller*, 131 Mass. 504; *Richardson v. Carlton*, 109 Iowa, 515, 80 N. W. 532; *Barrows v. Downs*, 9 R. I. 446, 11 Am. Rep. 283. See "*Partnership*," *Dec. Dig. (Key No.)* § 350; *Cent. Dig.* § 824.

<sup>41</sup> *EDWARDS v. WARREN LINOLINE & GASOLINE WORKS*, 168 Mass. 564, 47 N. E. 502, 38 L. R. A. 791. See "*Partnership*," *Dec. Dig. (Key No.)* §§ 349, 350; *Cent. Dig.* § 824.

<sup>42</sup> Alabama, Alaska, Arkansas, California, Colorado, Connecticut, Delaware, District of Columbia, Georgia, Hawaii, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Carolina, North Dakota, Ohio, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Utah, Vermont, Virginia, West Virginia, Wisconsin, and Wyoming. See references in note 20, above.

are called "partners in commendam."<sup>43</sup> In one territory<sup>44</sup> it is expressly provided that limited partnerships may be formed between corporations. In most states<sup>45</sup> it is expressly declared that the general partners alone shall have the power to make contracts and transact business. In seven states<sup>46</sup> no such restriction is expressly made. The special partners in many states<sup>47</sup> are formally authorized to examine into the affairs of the partnership, and to advise and consult with the other partners. Their other powers and limitations are noted in the subsequent sections.

#### *Number of Special Partners*

In two jurisdictions<sup>48</sup> the number of special partners is limited to six, but in the others<sup>49</sup> there is no restriction.

<sup>43</sup> So, also, in Panama and the Canal Zone. See references in note 20, above.

<sup>44</sup> Hawaii. See references in note 20, above. In Colorado and New Mexico, it is provided that a woman may be a special partner with her husband or others.

<sup>45</sup> Alabama, Arkansas, California, Colorado, District of Columbia, Georgia, Hawaii, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Maryland (unless the word "limited" used), Michigan, Minnesota, Montana, Missouri, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Carolina, North Dakota, Panama and the Canal Zone, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Utah, Virginia, West Virginia, Wisconsin, and Wyoming. See references in note 20, above. So, also, by Rev. St. N. Y. 1829, vol. 1, pt. 2, c. 4, tit. 1, § 3, the typical statute.

<sup>46</sup> Alaska, Connecticut, Delaware, Georgia (unless general partners are ill or absent, and he posts a notice showing who are general and who are special partners), Massachusetts, Missouri, Nevada, and Vermont. See references in note 20, above.

<sup>47</sup> Alabama, Arkansas, California, District of Columbia, Hawaii, Idaho, Illinois, Indiana, Maryland, Michigan, Minnesota, Montana, Nebraska, New Jersey, New Mexico, New York, North Carolina, North Dakota, Pennsylvania, South Carolina, South Dakota, Texas, Utah, West Virginia, Wisconsin, and Wyoming. See references in note 20, above.

<sup>48</sup> Maryland and the District of Columbia. In Iowa a limited partnership is to consist of "one or more persons, to be known as general partners, and a like number as special partners"; but this probably does not mean that the number of general and special partners must be the same. In Washington there must be at least two general and at least two special partners.

<sup>49</sup> *Holliday v. Union Bag & Paper Co.*, 3 Colo. 342. See "*Partnership*," Dec. Dig. (Key No.) § 353.

### SAME—CONTRIBUTION TO CAPITAL—HOW MADE

210. The contribution of the special partner must be actually paid in before the certificate is filed, and in most states must consist of actual cash, though in a few states it may consist of property, or of both. A general partner need make no contribution to the firm capital.

In most states<sup>50</sup> a special partner's contribution to the capital must be made "in cash," or "in actual cash payments," or "in actual money," or "actually and in good faith paid in lawful money of the United States." In twelve states<sup>51</sup> it may be made in cash or property. In a few jurisdictions<sup>52</sup> the statute is not specific on this point.

<sup>50</sup> Laws N. Y. 1822, c. 244, § 8; Laws Conn. 1822, c. 21, § 4; Rev. St. N. Y. 1829, vol. 1, pt. 2, c. 4, tit. 1, § 2. Alabama, Alaska, Arkansas, California, Connecticut, Delaware, District of Columbia, Georgia, Hawaii, Iowa, Kentucky, Maine, Maryland, Massachusetts, Minnesota, Missouri, Montana, Nevada, New Hampshire, New Mexico, New York, North Carolina, North Dakota, Ohio, Oregon, Pennsylvania, South Carolina, South Dakota, Tennessee, Texas, Vermont, Washington, West Virginia, Wisconsin, and Wyoming. See references in note 20, above.

<sup>51</sup> Colorado, Illinois, Indiana, Kansas, Louisiana, Michigan, Mississippi, Nebraska, New Jersey, Rhode Island, Utah, and Virginia. See references in note 20, above. In Colorado, Illinois, Kansas, Michigan, Mississippi, Rhode Island, and Virginia it may be in property "at cash value." In Indiana it may be in "cash, goods, merchandise, accounts, or bills receivable"; in Nebraska, "in actual cash payments, or in goods, wares, merchandise, machinery and fixtures"; in New Jersey, "in any goods, wares or merchandise of the kind in which the said partnership intend to deal, \* \* \* at a fair bona fide valuation"; in Utah, "in actual cash payments, or in real or personal property, or both." In Colorado, Indiana, New Jersey, Rhode Island, and Virginia, the property must be described in the certificate.

<sup>52</sup> Connecticut, Idaho, and Panama and the Canal Zone. In Connecticut the special partners are described as "furnishing capital to the partnership stock." No affidavit of payment is required. In Idaho the certificate must show that the sums contributed by the special partners "have been actually and in good faith paid."

Where the statute states that the contribution must be made in cash, the courts are very strict in construing this requirement literally, and payment in bonds,<sup>53</sup> notes,<sup>54</sup> or uncertified checks<sup>55</sup> is not sufficient.

The New York courts have however, shown a tendency to modify the rule in regard to checks, and in a later case<sup>56</sup> it has there been held that where the money is actually in the bank at the time the check is given, and is cashed or certified the next day, this is sufficient compliance with the statute.

It should be noted that in dealing with the question of the sufficiency of the cash contribution it is immaterial whether creditors have been misled or not. If the form of contribution is insufficient to satisfy the statute, all are liable as general partners.<sup>57</sup>

#### *Increase of Capital*

Provisions for increase of capital are found in a few states. In Indiana this may be done by taking in new special or general partners, or by the partners making new subscriptions. All must consent. A certificate should be filed and recorded, but failure to do so will not dissolve the firm or increase the special partner's liability.

In New York a special partner may increase his contribution of capital. A certificate must be filed, signed by all the general partners, verified by one. In Pennsylvania the provision is substantially similar to the Indiana statute.<sup>58</sup>

<sup>53</sup> *Haggerty v. Foster*, 103 Mass. 17. See "Partnership," *Dec. Dig. (Key No.)* § 355; *Cent. Dig.* §§ 829-833.

<sup>54</sup> *PIERCE v. BRYANT*, 5 Allen (Mass.) 91. See "Partnership," *Dec. Dig. (Key No.)* § 355; *Cent. Dig.* § 831.

<sup>55</sup> *Durant v. Abendroth*, 69 N. Y. 148, 25 Am. Rep. 158. See "Partnership," *Dec. Dig. (Key No.)* § 355; *Cent. Dig.* § 830.

<sup>56</sup> *WHITE v. EISEMAN*, 134 N. Y. 101, 31 N. E. 276. See "Partnership," *Cent. Dig.* § 834.

<sup>57</sup> *Durant v. Abendroth*, 69 N. Y. 148, 25 Am. Rep. 158; *Maloney v. Bruce*, 94 Pa. 249; *Elliot v. Himrod*, 108 Pa. 569; *Sheble v. Strong*, 128 Pa. 315, 18 Atl. 397; *Gearing v. Carroll*, 151 Pa. 79, 24 Atl. 1045. See "Partnership," *Dec. Dig. (Key No.)* § 355; *Cent. Dig.* §§ 829-833.

<sup>58</sup> See references in note 20, above.

## SAME—CERTIFICATE

**211. Persons forming a limited partnership must make and severally sign a certificate containing a statement of all the facts required by the statute.**

In all the states in which limited partnerships are provided for by statute, the members are required to sign and file a certificate. In a few states this is called by a different name.<sup>59</sup> This certificate in nearly all the states must contain (1) the firm name (sometimes called the "firm") under which the partnership is to do business; <sup>60</sup> (2) the general nature of the business to be transacted; <sup>61</sup> (3) the names and residences of all the partners, stating which are general and which are special partners; <sup>62</sup> (4) the amount

<sup>59</sup> Missouri: "A written statement." Virginia and West Virginia: "A paper." In Louisiana and Mississippi the articles of partnership are to be filed. See references in note 20, above.

<sup>60</sup> Laws N. Y. 1822, c. 244, § 6; Laws Conn. 1822, c. 21, § 3; Rev. St. N. Y. 1829. Alabama, Alaska, Arkansas, California, Colorado, Connecticut, Delaware, District of Columbia, Georgia, Hawaii, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Carolina, North Dakota, Ohio, Oregon, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Utah, Vermont, Virginia, Washington, West Virginia, Wisconsin, and Wyoming. See references in note 20, above.

<sup>61</sup> Rev. St. N. Y. 1829. Alabama, Alaska, Arkansas, California, Colorado, Delaware, District of Columbia, Georgia, Hawaii, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Carolina, North Dakota, Ohio, Oregon, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Utah, Vermont, Virginia, Washington, West Virginia, Wisconsin, and Wyoming. See references in note 20, above.

<sup>62</sup> Rev. St. N. Y. 1829; Laws N. Y. 1822, c. 244, §§ 6, 7; Laws Conn. 1822, c. 21, § 3. Alabama, Alaska, Arkansas, California, Colorado, Connecticut, Delaware, District of Columbia, Georgia, Hawaii, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, New

of capital contributed by each of the special partners;<sup>63</sup> and (5) the dates (frequently miscalled the "period") at which the partnership shall begin and end.<sup>64</sup> In five states<sup>65</sup> the place of business of the partnership must be stated in the certificate; and other special provisions are found in a few jurisdictions.<sup>66</sup>

York, North Carolina, North Dakota, Ohio, Oregon, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Utah, Vermont, Virginia, Washington, West Virginia, Wisconsin, and Wyoming. See references in note 20, above. In Alaska, Delaware, Maine, Oregon, and Washington there is no provision expressly requiring the certificate to distinguish between the general and special partners; and so under Laws Conn. 1822, c. 1, § 3.

<sup>63</sup> Rev. St. N. Y. 1829; Laws N. Y. 1822; Laws Conn. 1822. Alabama, Alaska, Arkansas, California, Colorado, Connecticut, Delaware, District of Columbia, Georgia, Hawaii, Idaho, Illinois, Indiana, Iowa, Kansas, Louisiana (the amount furnished, or agreed to be furnished, by each partner in commendam), Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Carolina, North Dakota, Ohio, Oregon, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Utah, Vermont, Virginia, Washington, West Virginia, Wisconsin, and Wyoming. See references in note 20, above. In Tennessee the provision is not limited to the capital contributed by the special partners. In Kentucky this provision is omitted. In Pennsylvania the amount contributed by each special partner must be stated in the certificate, but only the aggregate amount of the special partners' contributions must be published.

<sup>64</sup> Rev. St. N. Y. 1829; Laws N. Y. 1822; Laws Conn. 1822. Alabama, Alaska, Arkansas, California, Colorado, Connecticut, Delaware, District of Columbia, Georgia, Hawaii, Idaho, Illinois, Indiana, Iowa, Kansas, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Carolina, North Dakota, Ohio, Oregon, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Utah, Vermont, Washington, West Virginia, Wisconsin, and Wyoming. In Kentucky, Missouri, and Virginia the "duration" of the partnership is to be stated. See references in note 20, above.

<sup>65</sup> Colorado, Hawaii, Kentucky, Virginia, and West Virginia. See references in note 20, above.

<sup>66</sup> New York: Whether the various partners are of full age. Connecticut: The amount of capital already paid in. Virginia: That the death of a special partner shall effect a dissolution, if the partners desire so to provide. Illinois: Any special agreement as

There does not, however, seem to be any requirement that the certificate shall contain all the details of the partnership agreement, and there is nothing to prevent a special partner from agreeing with the other partners for an extension of his liability.<sup>67</sup> In five of the states which permit the capital contributed by the special partners to consist of property other than money<sup>68</sup> the property must be described in the certificate.

### *Signing and Acknowledging*

In all the states that have statutes on the subject of limited partnership, the certificate must be signed by all the partners, and in two<sup>69</sup> it must be witnessed. In one of the earliest statutes<sup>70</sup> the certificate must be sworn to before a judge; but this provision has been generally replaced by a requirement that the certificate shall be acknowledged by all the signers.<sup>71</sup> In most states the acknowledgment is to

to the terms of dissolution, or that dissolution shall not be caused by the death of a partner. Louisiana: The proportion of profits or losses to be borne by the partners in commendam. In the earliest American statutes (Laws N. Y. 1822 and Laws Conn. 1822) it was required that the certificate should state which of the general partners were authorized to transact the firm's business. So still, in Connecticut; the partnership is liable only for the acts of these partners. In the District of Columbia, if the certificate is signed by an attorney in fact, the power of attorney must be recorded.

<sup>67</sup> METROPOLITAN NAT. BANK of NEW YORK v. SIRRET, 97 N. Y. 320, 331. See "*Partnership*," *Dec. Dig. (Key No.)* § 352; *Cent. Dig.* § 826.

<sup>68</sup> Colorado, Indiana; New Jersey, Rhode Island, and Virginia. See references in note 20, above.

<sup>69</sup> Louisiana (one witness) and South Carolina (two). See references in note 20, above.

<sup>70</sup> Laws Conn. 1822, c. 21, § 4.

<sup>71</sup> Alaska, Arkansas, Colorado, Connecticut, Hawaii, Idaho, Illinois, Indiana, Iowa, Kansas, Maine, Maryland, Massachusetts, Michigan, Mississippi, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Mexico, New York, North Dakota, Pennsylvania, Rhode Island, South Carolina ("proved"), South Dakota, Texas, Utah, Vermont, Washington, Wisconsin, and Wyoming. In Minnesota and North Carolina the statute is indefinite as to the number of signers who must acknowledge it, and in Mississippi and Tennessee it is to be acknowledged like a conveyance of land. See references in note 20, above.

be before a justice of the peace,<sup>72</sup> or a person authorized to take acknowledgments of deeds;<sup>73</sup> but in a number of states there are various provisions for acknowledgment before particular officers.<sup>74</sup>

The certificate as a general rule speaks from the time it is filed, and it is sufficient if the statements made are true at that time;<sup>75</sup> but it has occasionally been decided that the certificate speaks from the time it is made.<sup>76</sup> Any falsehood in the certificate will impose general liability on all the partners, and as the purpose of the certificate is the protection of those dealing with the firm it is immaterial whether the falsehood was intentional or unintentional.<sup>77</sup>

<sup>72</sup> Delaware, Indiana, Maine, Massachusetts, New Hampshire, and Vermont. See references in note 20, above.

<sup>73</sup> Alaska, Arkansas, California, Colorado, Connecticut, Hawaii, Idaho, Illinois, Iowa, Kansas, Maryland, Michigan, Minnesota (apparently), Montana, Nebraska, Nevada, North Dakota, Ohio, Oregon, Pennsylvania, South Dakota, Tennessee (in substance), Utah, Washington, and Wyoming. In New Mexico it is to be acknowledged before any person authorized to take acknowledgments for record; in Texas, like a deed; and in South Carolina, to be "proved the same as deeds are proved." In West Virginia it is to be acknowledged like a power of attorney. See references in note 20, above.

<sup>74</sup> In Alabama, before a judge of the Supreme Court or circuit court or a judge of probate; in Georgia, before a judge of the superior court, ordinary, justice of the peace, or notary public; in Kentucky, before a clerk of any county court where the partnership has a place of business; in Arkansas, before a judge or justice of the peace; in the District of Columbia, before a judge of any court or a notary; in Nebraska and Utah, before a notary public or other person authorized to take acknowledgments of deeds; in Rhode Island, before a justice or notary; in Louisiana, before a recorder, notary, or person authorized to make the record, or on proof by a subscribing witness instead of acknowledgments. In Missouri, New York, and Wisconsin the statutes on limited partnership do not specify the officer by whom the acknowledgment is to be taken. Under Laws N. Y. 1822, c. 244, § 12, and Rev. St. N. Y. 1829, the acknowledgment was to be before the chancellor, a justice of the Supreme Court or circuit judge, or a judge of any county court. See references in note 20, above.

<sup>75</sup> *WHITE v. EISEMAN*, 134 N. Y. 101, 31 N. E. 276. See "*Partnership*," *Dec. Dig. (Key No.)* § 356; *Cent. Dig.* §§ 826, 834.

<sup>76</sup> *Vernon v. Brunson*, 54 N. J. Law, 586, 25 Atl. 511. See "*Partnership*," *Dec. Dig. (Key No.)* § 352; *Cent. Dig.* § 826.

<sup>77</sup> *Haggerty v. Foster*, 103 Mass. 17, 20; *Van Ingen v. Whitman*,

## SAME—RECORDING

212. The certificate must be recorded in the county where the partnership has its principal place of business, and a copy in every county where it has a regular place of business, and must remain on file.<sup>78</sup>

In most states<sup>79</sup> the certificate must be recorded with the county clerk of the county where the partnership has its principal place of business, or with the county recorder,<sup>80</sup> or register of deeds,<sup>81</sup> while in other states there are other varying provisions.<sup>82</sup> In some states the certificate

62 N. Y. 513. See "*Partnership*," *Dec. Dig. (Key No.)* §§ 355, 362; *Cent. Dig.* §§ 829, 842.

<sup>78</sup> *Henkel v. Heyman*, 91 Ill. 90. See "*Partnership*," *Dec. Dig. (Key No.)* § 357; *Cent. Dig.* § 835.

<sup>79</sup> California (also with county recorder), Colorado, Illinois, Kansas, Michigan, Missouri, Montana, Nebraska, New Jersey, New York, North Dakota (also with clerk of district court), Oregon, Texas, and Wyoming (also with register of deeds). So, also, by *Laws N. Y. 1822*, c. 244, § 6; *Rev. St. N. Y. 1829*. See references in note 20, above.

<sup>80</sup> California (also with county clerk), Delaware, Idaho, Indiana, Missouri, Nevada, New Mexico, Ohio, Pennsylvania, and Utah. See references in note 20, above.

<sup>81</sup> Maine, Minnesota, North Carolina, North Dakota (also with clerk of district court), South Dakota (also with clerk of circuit court), and Wyoming (also with county clerk). See references in note 20, above.

<sup>82</sup> In Kentucky and South Carolina, with the clerk of the county court, and so in West Virginia, in each county where the firm does business; in Arkansas, Maryland (with special provisions for Baltimore), South Dakota (also with register of deeds), and Wisconsin, with the clerk of the circuit court; in Georgia, with the clerk of the superior court; in the District of Columbia, with the clerk of the Supreme Court of the District; in Iowa and North Dakota (also with register of deeds), with the clerk of the district court for the county; in Mississippi, to be filed with the clerk of the chancery court, and recorded in the record of deeds of land; in Alabama, in the office of the judge of probate; in Washington, with the county auditor; in Alaska, with the recorder of the precinct; in Louisiana, with the officer authorized to record mortgages; in Massachusetts, with the secretary of the commonwealth; in Hawaii, with "the treasurer"; and in Connecticut, New Hampshire,

is to be recorded "at length,"<sup>83</sup> or "at large."<sup>84</sup> In one state<sup>85</sup> a certified copy of the certificate is to be prima facie evidence of the matters recited therein; and this would seem to be the rule even where the statute is silent.<sup>86</sup> In seven states<sup>87</sup> the original certificate, and in most states<sup>88</sup> a transcript or certified copy of it, is to be recorded in each county where the partnership maintains a place of business.

### SAME—PUBLICATION

#### 213. A copy of the certificate must be published as required by statute.

Publication of the certificate is always essential,<sup>89</sup> and in nearly all of the states it must be published in one<sup>90</sup> or

Rhode Island, and Vermont, with the town clerk. See references in note 20, above.

<sup>83</sup> Kansas and Michigan. See references in note 20, above.

<sup>84</sup> Rev. St. N. Y. 1829. Arkansas, Colorado, District of Columbia, Georgia, Illinois, Maryland, New Jersey, New Mexico, Pennsylvania, South Carolina, Tennessee, and Texas. See references in note 20, above.

<sup>85</sup> Connecticut. See references in note 20, above.

<sup>86</sup> *Hogg v. Orgill*, 34 Pa. 350. But see, also, *Madison County Bank v. Gould*, 5 Hill (N. Y.) 309. See "*Partnership*," *Dec. Dig. (Key No.)* § 357; *Cent. Dig.* § 835.

<sup>87</sup> Delaware, Maine, Mississippi (the articles of partnership), Ohio, Texas, Virginia, and West Virginia. See references in note 20, above.

<sup>88</sup> Rev. St. N. Y. 1829. Alabama, Arkansas, California, Colorado, Connecticut (in towns), Georgia, Idaho, Illinois, Indiana, Iowa, Kansas, Louisiana (if a commercial partnership), Maryland, Michigan, Minnesota, Missouri, Montana, Nebraska, Nevada, New Jersey, New Mexico, New York, North Carolina, North Dakota (filed in the clerk's office and recorded in the registry of deeds), Pennsylvania, Rhode Island (in towns), South Carolina, South Dakota, Tennessee, Utah, Vermont (in towns), Wisconsin, and Wyoming. Under Laws N. Y. 1822, c. 244, § 6, simply the name of the firm was to be registered in each county.

<sup>89</sup> *Haddock v. Grinnell Mfg. Corp.*, 109 Pa. 380, 1 Atl. 174; *Davis v. Sanderlin*, 119 N. C. 84, 25 S. E. 815; *Ussery v. Crusman* (Tenn. Ch. App.) 47 S. W. 567. See "*Partnership*," *Dec. Dig. (Key No.)* § 357; *Cent. Dig.* § 835.

<sup>90</sup> Alaska, Arkansas, California, Colorado, Connecticut, Delaware,

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<sup>91</sup> See note 91 on following page.

two<sup>91</sup> newspapers. The publication is to be begun immediately after the certificate is recorded,<sup>92</sup> or within a week,<sup>93</sup> or twenty days,<sup>94</sup> or one month,<sup>95</sup> or two months,<sup>96</sup> and is to continue once a week for three<sup>97</sup> or four<sup>98</sup> or six<sup>99</sup> weeks. The papers in which the certificate or its terms are to be thus published are in several states required to be papers published in the county where the partnership has its principal place of business, or, if none is published in that county, in the county nearest thereto.<sup>1</sup> Other provisions for

Idaho, Indiana, Kansas, Maine, Massachusetts, Minnesota (apparently), North Carolina, North Dakota, Ohio, Oregon, South Carolina, Utah, Vermont, Virginia, Washington, West Virginia, and Wyoming. See references in note 20, above.

<sup>91</sup> Laws N. Y. 1822, c. 244, § 14; Laws Conn. 1822, c. 21, § 7; Rev. St. N. Y. 1829. Alabama, District of Columbia, Georgia (if two in county, otherwise in one; if one, in the one in which the sheriff advertises), Hawaii, Iowa, Maryland, Michigan, Nebraska, New York, Pennsylvania, Rhode Island, and Wisconsin. See references in note 20, above. In Mississippi, publication is not required.

<sup>92</sup> Alabama, Alaska, Colorado, District of Columbia, Georgia (unless made within two months, the partnership is to be treated as general), Illinois, Indiana, Maryland, Massachusetts, Michigan, Minnesota, Nebraska, Nevada, New York, North Carolina, Ohio, Oregon, Pennsylvania, Rhode Island, Tennessee, Texas, Utah, and Virginia. See references in note 20, above.

<sup>93</sup> California, Hawaii, Montana, North Dakota, South Dakota, and Wyoming. See references in note 20, above.

<sup>94</sup> Maine.

<sup>95</sup> Idaho.

<sup>96</sup> See note 92, above, as to Georgia. In Connecticut and Delaware there is no provision on this subject.

<sup>97</sup> Nevada and New Hampshire. See references in note 20, above.

<sup>98</sup> Alaska, California, Colorado, District of Columbia (three times a week), Hawaii, Idaho, Kansas, Kentucky, Minnesota, Missouri, Montana, North Dakota, Oregon, South Dakota, Utah, Virginia, Washington, and Wyoming. See references in note 20, above.

<sup>99</sup> Laws N. Y. 1822, c. 244, § 14; Laws Conn. 1822, c. 21, § 7; Rev. St. N. Y. 1829. Alabama, Arkansas, Connecticut (twice a week), Georgia, Illinois, Indiana, Iowa, Maine, Maryland, Massachusetts, Michigan, Nebraska, New Jersey, New York, North Carolina, Ohio, Pennsylvania, Rhode Island, South Carolina, Tennessee, Texas, Vermont, West Virginia, and Wisconsin. See references in note 20, above.

<sup>1</sup> Colorado, Georgia, Idaho, Illinois, Indiana, Montana, Nevada, and New Jersey. In California, North and South Dakota, and

designating the paper or papers are referred to in the note below.<sup>2</sup> In twenty-eight states "proof of publication,"<sup>3</sup>

Wyoming, if no newspaper is published in the county, the publication is to be made in the nearest paper published within the state; in Maine, Ohio, South Carolina, and Vermont, in a paper published in an adjacent county; in Ohio, the newspaper, if published in an adjacent county, must be of general circulation in the county where the partnership has its principal place of business, and publication must also be made in every county where it has a place of business; in South Carolina, notice must also be posted on the courthouse door. See references in note 20, p. 597, above.

<sup>2</sup> Iowa: Newspaper designated by clerk of court where filed, publication in the senatorial district. Alabama: Two papers designated by the judge of probate. Pennsylvania: Designated by the recorder of deeds—shall be the legal journal of the county, if any. Tennessee: Designated by the register of deeds. Utah: By the county recorder. District of Columbia: Two designated by the clerk of the Supreme Court of the District. Arkansas: One designated by the clerk of the circuit court. Texas: By the county clerk. Nebraska: Two published in county where registered, designated by county clerk; if none in county, then published in judicial district where business is conducted. New York: Two designated by county clerk, one in city or town where principal place of business is, or, if none there, then in the nearest county paper. Wisconsin: Two designated by clerk of circuit court for county where registered, and published within the judicial circuit. Delaware and Rhode Island: In any paper published in the state. Kansas: In the county where the certificate is recorded, or in any paper of general circulation therein. Kentucky and Missouri: In a paper published in each place where the firm has a place of business, or, if none published there, then in the nearest paper. Hawaii: In two papers published in Honolulu in English. Alaska: One published in precinct where the firm does business, or if none, then in a paper of general circulation there. Ohio and Washington: One paper in county where the firm does business, or, if none, then in any paper of general circulation there (in Washington must be a weekly). Virginia and West Virginia: In each county where the firm does business. Virginia: If none, must post four weeks on courthouse door. Massachusetts: In county where the firm has principal place of business, or, if none, then in Boston. California and Connecticut: In county where the certificate is recorded. North Carolina: "In the same county, or near the place of said partnership business." Utah: In each county where the certificate is recorded, or, if none published there, then within judicial district. See references in note 20, p. 597, above. Under Laws N. Y. 1822, c. 244, § 14, and Laws

<sup>3</sup> Minnesota.

or an affidavit of publication filed by the printer,<sup>4</sup> proprietor,<sup>5</sup> publisher,<sup>6</sup> or editor,<sup>7</sup> or by one of the editors or publishers,<sup>8</sup> or by the printer or publisher,<sup>9</sup> or by the printers, publishers, or editors,<sup>10</sup> or by the printer, publisher, or chief clerk,<sup>11</sup> or by the printer, publisher, or foreman,<sup>12</sup> or by the printers or some one in their employ knowing of the publication,<sup>13</sup> may be filed,<sup>14</sup> and shall be evidence,<sup>15</sup> or prima facie or presumptive evidence,<sup>16</sup> of the facts stated. The notice published must agree with the certificate in every substantial point,<sup>17</sup> but a variance which is not material, such as a slight inaccuracy in the spelling of a name, will not be fatal,<sup>18</sup> and if the variance is in the date for the

Conn. 1822, c. 21, § 7, publication was to be made in any two papers published in the senate district. Rev. St. N. Y. 1829, provided that they should be designated by the county clerk or clerk of court.

<sup>4</sup> Alabama, Arkansas, New Hampshire, Pennsylvania, and South Carolina. Rev. St. N. Y. 1829. See references in note 20, p. 597, above.

<sup>5</sup> North Carolina.

<sup>6</sup> Iowa and Texas.

<sup>7</sup> Maryland.

<sup>8</sup> District of Columbia.

<sup>9</sup> Hawaii, Illinois, and New York. See references in note 20, p. 597, above.

<sup>10</sup> Georgia and Tennessee.

<sup>11</sup> California, Idaho, Montana, North and South Dakota, and Wyoming.

<sup>12</sup> Nebraska, Utah, and Wisconsin.

<sup>13</sup> Kansas and Michigan.

<sup>14</sup> In Massachusetts and New York, it must be filed; in Massachusetts, it must be made by one of the partners, and filed and recorded within sixty days after recording the certificate. See references in note 20, p. 597, above.

<sup>15</sup> Alaska, Arkansas, Georgia, Illinois, Kansas, Maryland, Michigan, Nebraska, New Hampshire, Pennsylvania, South Carolina, Tennessee, Texas, Utah, Wisconsin, and Wyoming. See references in note 20, p. 597, above. So in Rev. St. N. Y. 1829.

<sup>16</sup> California, District of Columbia, Hawaii, Idaho, Iowa, Montana, North Dakota, and South Dakota. See references in note 20, p. 597, above.

<sup>17</sup> *Manhattan Co. v. Phillips*, 109 N. Y. 383, 17 N. E. 129; *Smith v. Argall*, 6 Hill (N. Y.) 479. See "*Partnership*," *Dec. Dig. (Key No.)* § 357; *Cent. Dig.* § 835.

<sup>18</sup> *Smith v. Argall*, 6 Hill (N. Y.) 479. See "*Partnership*," *Dec. Dig. (Key No.)* § 357; *Cent. Dig.* § 835.

commencement of the partnership, it will not affect the liability of the special partner on contracts made later than either date mentioned;<sup>19</sup> but any variance will be sufficient to impose general liability on all the partners, if any person dealing with the firm has been misled by it, and this is a question of fact for the jury.<sup>20</sup>

### SAME—AFFIDAVIT OF PAYMENT OF CAPITAL.

214. In the same office where the original certificate is filed there must also, in most states, be filed an affidavit of one or more of the general partners, stating that the sums specified in the certificate to have been paid in by the special partners have been actually and in good faith paid in cash.

In most states an affidavit must be filed, made by one or more of the general partners,<sup>21</sup> and in some states by one or more of the special partners,<sup>22</sup> or by all the partners,<sup>23</sup> in the same office where the original certificate was filed,<sup>24</sup>

<sup>19</sup> *Levy v. Lock*, 47 How. Prac. (N. Y.) 394; *Madison County Bank v. Gould*, 5 Hill (N. Y.) 309. See "*Partnership*," *Dec. Dig. (Key No.)* § 357; *Cent. Dig.* § 835.

<sup>20</sup> *Bowen v. Argall*, 24 Wend. (N. Y.) 496. See "*Partnership*," *Dec. Dig. (Key No.)* § 375; *Cent. Dig.* § 859.

<sup>21</sup> Alabama, District of Columbia, Illinois, Iowa, Kansas, Kentucky, Maryland, Michigan, Minnesota, Mississippi, Missouri, Nebraska, New Hampshire, New Jersey, New York, North Carolina, Pennsylvania, South Carolina, Tennessee, Texas, Utah, Virginia, West Virginia, and Wisconsin. So under Laws Conn. 1822, c. 21, § 4; Laws N. Y. 1822, c. 244, § 8; Rev. St. N. Y. 1829. In Arkansas, the affidavit is to be made by one of the general partners. See references in note 20, p. 597, above.

<sup>22</sup> Colorado and New Mexico.

<sup>23</sup> California, Georgia, Hawaii, Idaho, Montana, North and South Dakota, and Wyoming. See references in note 20, p. 597, above.

<sup>24</sup> Alaska, Arkansas, California, District of Columbia, Hawaii, Idaho, Illinois, Kansas, Maryland, Michigan, Minnesota, Mississippi, Montana, Nebraska, New Hampshire, New Jersey, New Mexico, North Carolina, North Dakota, Pennsylvania, South Carolina, South Dakota, Tennessee, Texas, Utah, Vermont, Virginia, West Virginia,

stating that the sums stated in the certificate to have been contributed by each special partner have been actually and in good faith paid in cash (or, in states where the contribution may be made in property, in cash or property at a fair cash valuation), or as specified in the certificate.<sup>25</sup> In one state <sup>26</sup> a certified copy of the affidavit is made *prima facie* evidence; but this provision seems of no advantage.

### SAME—FAILURE TO FILE CERTIFICATE

215. Until the certificate is filed and recorded,<sup>27</sup> and in most states until the affidavit is also filed,<sup>28</sup> the limited partnership is not to be considered as organized.<sup>29</sup>

Wisconsin, and Wyoming. See reference in note 20, p. 597, above. In Mississippi, it is to be recorded as part of the articles of the partnership; in Virginia and West Virginia, it constitutes part of the certificate; in New Mexico and New York, it must be filed in each county; in Iowa, it must be attached to the certificate; in Missouri, it must be filed with the county recorder.

<sup>25</sup> Rev. St. N. Y. 1829; Alabama, Arkansas, California, Colorado, District of Columbia, Georgia, Hawaii, Idaho, Illinois, Iowa, Kansas, Maryland, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, New Hampshire, New Jersey, New Mexico, New York, North Carolina, North Dakota, Pennsylvania, South Carolina, South Dakota, Tennessee, Texas, Utah, Virginia, Wisconsin, and Wyoming. In Kentucky, the affidavit must verify the statement in the certificate; in Mississippi, it must describe the property. See references in note 20, p. 597, above.

<sup>26</sup> Georgia.

<sup>27</sup> Alaska, Connecticut, Maine, Ohio, Oregon, Virginia ("and admitted to record as of each person signing"), Washington, and West Virginia (and published). See references in note 20, p. 597, above.

<sup>28</sup> Rev. St. N. Y. 1829. Alabama, Arkansas, California, Colorado, District of Columbia, Georgia, Hawaii, Idaho, Illinois, Kansas, Kentucky, Maryland, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, Nevada, New Jersey, North Carolina, New Mexico, North Dakota, Pennsylvania, South Carolina, South Dakota, Tennessee, Texas, Utah, Wisconsin, and Wyoming. See references in note 20, p. 597, above.

<sup>29</sup> And in Connecticut and Maine it is expressly provided that the special partners shall be liable meanwhile as general partners.

If any false statement is made in the certificate<sup>30</sup> (or, in most states, in either the certificate or the affidavit),<sup>31</sup> all of the partners are liable as general partners, and the subsequent performance of an act stated to have been already performed will not cure the defect.<sup>32</sup>

In two states<sup>33</sup> all persons interested are liable on all firm contracts or engagements. In four states<sup>34</sup> an exception is made in case of an unintentional false statement, which makes the special partner liable as a general partner only to such firm creditors as are actually misled. In six states<sup>35</sup> a method of protection against honest mistakes is provided. Where there was an effort in good faith to form a limited partnership and the person dealing with the firm has received a memorandum showing that the partnership is special, and who are the special partners, the latter do not become liable to him as general partners.<sup>36</sup>

<sup>30</sup> Idaho, Indiana, Massachusetts, Nevada, New Hampshire, North Dakota, Rhode Island, and Vermont. See references in note 20, p. 597, above.

<sup>31</sup> Alabama, Alaska, Arkansas, California, Colorado, Connecticut, District of Columbia (if not the result of accident or mistake), Georgia, Hawaii, Illinois, Kansas (all partners making or consenting to it liable as general partners), Kentucky (if any part false), Maine (to persons misled), Maryland, Massachusetts, Michigan, Maine, Mississippi (except to each other), Missouri (and also for perjury if affidavit false), Montana (if wilful), Nebraska, New Jersey, New Mexico, New York, North Carolina, Ohio, Oregon, Pennsylvania, South Carolina, South Dakota, Tennessee, Texas, Utah, Virginia, Washington, West Virginia, and Wyoming. So, also, under Laws N. Y. 1822, c. 244, § 8; Laws Conn. 1822, c. 21, § 4; Rev. St. N. Y. 1829. See references in note 20, p. 597, above.

<sup>32</sup> MYERS v. EDISON GENERAL ELECTRIC CO., 59 N. J. Law, 153, 35 Atl. 1069; Durant v. Abendroth, 69 N. Y. 148, 25 Am. Rep. 158. See "Partnership," *Dec. Dig. (Key No.)* § 356; *Cent. Dig.* § 834.

<sup>33</sup> Iowa and Wisconsin.

<sup>34</sup> California, Hawaii, Idaho, and Maine.

<sup>35</sup> California, Idaho, Montana, North and South Dakota, and Wyoming. See references in note 20, p. 597, above.

<sup>36</sup> By Laws N. Y. 1822, c. 244, § 8, and Laws Conn. 1822, c. 21, § 4, it was expressly provided that persons guilty of false swearing should be guilty of perjury. This has been left to be inferred from the general criminal code in most later statutes. See note 31, above.

## DURATION—CONTINUANCE OR RENEWAL

216. A limited partnership commences and ends at the dates named in the certificate. It may be renewed for an additional term in substantially the same manner as it was originally constituted.

A limited partnership begins and ends at the dates named in the certificate, and in all transactions made either before the date specified for the commencement or after the date specified for the ending the liability of all of the partners is general;<sup>37</sup> but such general liability for acts done prior to the formal commencement of the limited partnership will not increase the liability of the special partners on transactions after that date.<sup>38</sup> Every renewal or continuance of a limited partnership must be certified,<sup>39</sup> acknowledged,<sup>40</sup> or "verified," or "sworn to,"<sup>41</sup> and recorded,<sup>42</sup> and

<sup>37</sup> *SARMIENTO v. THE CATHERINE C.*, 110 Mich. 120, 67 N. W. 1085. See "*Partnership*," *Dec. Dig.* (Key No.) §§ 360, 361; *Cent. Dig.* §§ 837, 838.

<sup>38</sup> *Lachomette v. Thomas*, 5 Rob. (La.) 172. See "*Partnership*," *Dec. Dig.* (Key No.) §§ 359, 361, 362; *Cent. Dig.* §§ 837, 838, 842.

<sup>39</sup> Alabama, Alaska, Arkansas, California, Connecticut, Delaware, District of Columbia, Georgia, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Maine, Maryland, Massachusetts (need certify only that at the time of the renewal the amount contributed by each special partner and the whole capital equals or exceeds the amount originally contributed), Michigan, Minnesota, Mississippi (partnership articles instead of a certificate), Missouri, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Carolina, North Dakota, Ohio, Oregon, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Utah, Vermont, Virginia, Washington, West Virginia, Wisconsin, and Wyoming. So, also, under Rev. St. N. Y. 1820. See references in note 20, p. 597, above.

<sup>40</sup> Alabama, Alaska, Arkansas, California, Delaware, District of Columbia, Georgia, Idaho, Illinois, Indiana, Iowa, Kansas, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, New York,

<sup>41</sup> Connecticut (must state certain facts), Montana, North and South Dakota, Virginia, and Wyoming.

<sup>42</sup> See note 42 on following page.

in most states an affidavit of a general partner made and filed,<sup>43</sup> and publication made or notice given as required upon the filing of the original certificate.<sup>44</sup> The efficacy of notice by newspaper publication is less an article of faith among lawyers to-day than ninety years ago; and it may be doubted whether the requirement of a new publication should be necessary if a new certificate is filed and indexed or recorded, with an affidavit that the capital has not been reduced since the original certificate was made.

If the statutory requirements are not complied with, the partnership becomes general.<sup>45</sup> There are a few special provisions on this subject in various states.<sup>46</sup>

North Carolina, Ohio, Oregon, Pennsylvania, Rhode Island, South Carolina ("proved"), Tennessee ("proved"), Texas, Utah, Vermont, Washington, and Wisconsin. So, also, under Rev. St. N. Y. 1829. See references in note 20, p. 597, above.

<sup>42</sup> Alabama, Alaska, Arkansas, California, Delaware, District of Columbia, Georgia, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Carolina, North Dakota, Ohio, Oregon, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Utah, Vermont, Virginia, Washington, West Virginia, Wisconsin, and Wyoming. So, also, under Rev. St. N. Y. 1829. See references in note 20, p. 597, above.

<sup>43</sup> Alabama, Alaska, District of Columbia, Georgia, Illinois, Iowa, Kansas, Maryland, Massachusetts (only that a new certificate has been published; this affidavit may be made by any partner), Michigan, Minnesota, Mississippi, Missouri, Nebraska, New Jersey, New Mexico, New York, North Carolina, Pennsylvania, South Carolina, Tennessee, Texas, Utah, and Wisconsin. See references in note 20, p. 597, above. So, also, under Rev. St. N. Y. 1829.

<sup>44</sup> Alabama, Alaska, Arkansas, California, Delaware, District of Columbia, Georgia, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Maine, Maryland, Michigan, Minnesota, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New York, North Carolina, North Dakota, Oregon, Pennsylvania, South Carolina, South Dakota, Texas, Utah, Vermont, Virginia, Washington, West Virginia, Wisconsin, and Wyoming. So, also, under Rev. St. N. Y. 1829. In Connecticut the publication is to be made once a week for two weeks. See references in note 20, p. 597, above.

<sup>45</sup> In Connecticut there is no express provision to this effect.

<sup>46</sup> In New Hampshire the renewal must be within thirty days after the expiration of the old partnership. In Virginia and West Virginia, if the capital is not altered, the certificate may state sim-

There is a conflict of opinion as to whether or not a legal renewal may be made if the capital of the special partner has become impaired. Some courts hold that the renewal certificate must state that the contribution of the special partner remains unimpaired,<sup>47</sup> and others that the statement refers only to the amount of the original contribution;<sup>48</sup> and this latter view seems more sound, for, as there is no change in the partnership, except in duration, the special partner should not assume any additional liability, and in a going business it might well prove practically impossible to swear positively whether the original contribution was impaired or not.

### EFFECT OF ALTERATION

**217.** The statutes of most states provide that any alteration in any of the matters stated in the certificate shall be deemed a dissolution of the partnership, and that if such partnership is carried on after such alteration it shall be deemed a general partnership.

If there is a change in the names of partners or of the firm, in the nature of the business, the capital or the shares thereof, or in any other matter required to be set forth in the original certificate<sup>49</sup>—or in some states if the nature

ply when it was originally contributed. Compare the Massachusetts provision above noted. A similar provision exists in North Carolina. See references in note 20, p. 597, above.

<sup>47</sup> *FOURTH ST. NAT. BANK v. WHITAKER*, 170 Pa. 297, 33 Atl. 100. See "*Partnership*," *Dec. Dig. (Key No.)* § 361; *Cent. Dig.* § 838.

<sup>48</sup> *HOGAN v. HADZSITS*, 113 Mich. 563, 71 N. W. 1092; *Fifth Ave. Bank v. Colgate*, 120 N. Y. 381, 24 N. E. 799, 8 L. R. A. 712; *Arnold v. Danziger (C. C.)* 30 Fed. 898, 900. See "*Partnership*," *Dec. Dig. (Key No.)* § 361; *Cent. Dig.* § 838.

<sup>49</sup> Alaska, Arkansas, District of Columbia, Georgia, Iowa, Kansas, Maryland, Michigan, Minnesota, Mississippi (does not specify changes in the capital), Missouri (first three only), Nebraska, New Hampshire, New Jersey, New Mexico, New York, North Carolina, Ohio, Pennsylvania, South Carolina, Tennessee, Texas, Utah, Virginia, West Virginia, and Wisconsin. So under Rev. St. N. Y. 1829.

of the business or the firm name is changed, or if a partner withdraws or a new partner is admitted, and a new certificate is not filed and acknowledged, and published within ten days<sup>50</sup>—the effect in most states, unless there is a formal renewal, is to cause a dissolution of the partnership;<sup>51</sup> and if the business is continued after the alteration without recording a new certificate the partnership is a general one.<sup>52</sup> In seven states<sup>53</sup> the alteration does not effect a dissolution, but makes the special partners immediately liable as general, whether the business is continued or not.

### FIRM NAME—FIRM SIGN

**218.** In most states the partnership business must be transacted in a firm name in which the names of the special partners do not appear, and without the addition of the word "company" or any other general term.

In Kentucky, it is an alteration if there is a change in the partners, or in the nature of the business, or a withdrawal of capital. See references in note 20, p. 597, above.

<sup>50</sup> California, Hawaii, Idaho, Montana, North Dakota, South Dakota ("verified," instead of acknowledged), and Wyoming (verified and signed by one or more of the partners). See references in note 20, p. 597, above.

<sup>51</sup> Alaska, Arkansas, District of Columbia, Georgia, Iowa, Kansas, Maryland, Michigan, Minnesota, Nebraska, New Jersey, New Mexico, North Carolina, Ohio, Pennsylvania, South Carolina, Tennessee, Texas, Utah, West Virginia, and Wisconsin. See references in note 20, p. 597, above. So under Rev. St. N. Y. 1829.

<sup>52</sup> Alabama, Arkansas, District of Columbia, Georgia, Hawaii, Idaho, Iowa, Kansas, Kentucky and Missouri (as to any special partner knowing the facts), Maryland, Michigan, Minnesota, Mississippi, Nebraska, New Jersey, New Mexico, New York, North Carolina, Ohio, Pennsylvania, South Carolina, Tennessee, Texas, Utah, Virginia, West Virginia, and Wisconsin. So by Rev. St. N. Y. 1829. Under the original statutes (Laws N. Y. 1822, c. 244, § 7, and Laws Conn. 1822, c. 21, § 3) there was merely a directory provision for recording. See reference in note 20, p. 597, above.

<sup>53</sup> California, Hawaii, Idaho, Montana, New Hampshire, North Dakota, and Wyoming. See references in note 20, p. 597, above.

219. In several states the partnership must post a sign in some conspicuous place, bearing the full name of all the partners.

All limited partnerships are required by statute to adopt and set forth in the certificate their firm name and as a general rule this name must not contain the names of the special partners, but only of one or more of the general partners;<sup>54</sup> but in some cases the name of the special partner may by statute be used if it was a part of the name of a former general partnership to which the limited partnership succeeds.<sup>55</sup> In three states<sup>56</sup> the special partners'

<sup>54</sup> Alabama, Alaska, Arkansas, Colorado, Connecticut, Delaware, District of Columbia, Georgia, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Maryland, Massachusetts (must use all except not more than three), Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Carolina, North Dakota, New Hampshire (by implication), Ohio (must use all, unless use "& Co."), Oregon, Panama and Canal Zone, Pennsylvania (all, except, if three or more, may use any two and "& Co." and post a sign, or in any case may use name of one and "& Co.," and post sign), Rhode Island, South Carolina (Compare Civ. Code 1902, § 1700), South Dakota, Tennessee, Texas, Utah, Vermont (all, unless more than three), Washington, West Virginia, and Wisconsin. In Montana, Nebraska, Nevada, New Jersey, North Carolina, Tennessee, Texas, Utah, Washington, West Virginia, and Wisconsin the words "one or more of" are omitted. In Virginia, any name may be used, if the names of the special partners do not appear (a sensible provision), and the firm may advertise themselves as "successors," without increasing the special partner's liability, though his name appears in the old firm. In Massachusetts and Missouri, a limited partnership may do business under the name of its predecessor, with the consent of the latter's members or their personal representatives (so in Ohio, if the former firm has been in business for five years or more), and a special partner is not liable as a general partner because a general partner's surname is used which is the same as his own, or because his surname appears in the name of the predecessor firm. There is a similar provision in Rhode Island, provided the word "Limited" is used, and also in South Carolina. See references in note 20, p. 597, above.

<sup>55</sup> GROVES v. WILSON, 168 Mass. 370, 47 N. E. 100. See "Partnership," *Dec. Dig.* (Key No.) § 358; *Cent. Dig.* § 836. See next preceding note.

<sup>56</sup> California, Hawaii, and Idaho.

names may be used if the word "Limited" is added. The words "& Co." are not to be used,<sup>57</sup> or any other general term;<sup>58</sup> but in New York, where the statute forbids the use of the words "and Company" or "& Co." to represent a special partner, the court held that, as no penalty for such use was provided, and as a creditor was not likely to be misled or injured, it could not impose the liability of a general partner for this violation of the statute.<sup>59</sup> In seven states<sup>60</sup> such an addition may or may not be used. In a few states<sup>61</sup> the word "Limited" must be used in the firm name. If the name of a special partner is used with his privity or consent, he is liable as a general partner.<sup>62</sup> In

<sup>57</sup> Alaska, Arkansas, Georgia, Iowa, Kansas, Kentucky, Maine, Massachusetts, Missouri, New Jersey, North Carolina, Oregon, Pennsylvania (except when a sign is posted), South Carolina (if these words used without representing an actual partner, constitutes a misdemeanor, except where the use of a partnership name is continued as authorized), Tennessee, Texas, Vermont, Washington, and West Virginia. So by Rev. St. N. Y. 1829. In Louisiana, New Mexico, and Wisconsin these words must not be used, unless there is more than one general partner. See references in note 20, p. 597, above.

<sup>58</sup> Alaska, Arkansas, Iowa, Kansas, Kentucky, Massachusetts, Michigan, Missouri, New Jersey, North Carolina (except the word "Limited"), Oregon, Pennsylvania, South Carolina, Tennessee, Texas, Vermont, Washington, and West Virginia. See references in note 20, p. 597, above.

<sup>59</sup> *BUCK v. ALLEY*, 145 N. Y. 488, 40 N. E. 236. See "*Partnership*," *Dec. Dig. (Key No.)* § 358; *Cent. Dig.* § 886.

<sup>60</sup> District of Columbia, Maryland, Michigan, Minnesota, New York, and North and South Dakota. See references in note 20, p. 597, above.

<sup>61</sup> Alabama, Kentucky (in the sign), Maryland (in the sign, if a special partner participates in the business), and North Carolina (permissive). In California, Hawaii, Idaho, and Wyoming the word must be used, if the firm uses a special partner's name.

<sup>62</sup> Alabama, Alaska, Arkansas, Colorado, Connecticut (or even without his knowledge), Delaware, District of Columbia, Georgia, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Massachusetts, Michigan, Minnesota, Mississippi, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Carolina, Ohio, Oregon, Pennsylvania, Rhode Island, South Carolina, Tennessee, Texas, Utah (even without his knowledge), Vermont, Virginia, Washington ("with his consent or privity"), West Virginia, and Wisconsin. So under Laws N. Y. 1822, c. 244, § 4;

some states it is provided that every limited partnership shall post on the outside of the front of the building where its principal place of business is a sign in legible English characters containing the full names of all its members.<sup>63</sup>

### WITHDRAWALS OF CAPITAL

220. No part of the sum contributed by any special partner to the capital stock shall be withdrawn by him, or paid or transferred to him in the shape of dividends, profits, or otherwise, at any time during the continuance of the partnership. But any partner may annually receive lawful interest on the sum so contributed by him, if the payment thereof does not reduce the original capital.

In every statute the withdrawal or impairment of capital by a special partner is forbidden;<sup>64</sup> but he may annually receive lawful interest or profits on his share, if this does

Laws Conn. 1822, c. 21, § 2; Rev. St. N. Y. 1829. In California and Maryland, he is liable, unless the word "limited" is used; and see above. In Alaska and Washington, he is not liable to any person to whom he makes it appear that he acted and was recognized as a general partner only. See references in note 20, p. 597, above.

<sup>63</sup> Minnesota, Missouri, New York, North Dakota, Ohio (names of all the general partners), Pennsylvania (if uses "& Co."), South Dakota, Virginia, and Wisconsin. In Missouri, New York, North and South Dakota, Virginia, and Wisconsin, the sign must distinguish between general and special partners. In Missouri and Virginia, the sign must be legible, but not necessarily in English, and must be posted at each place of business. In Kentucky, a sign must be posted at each place of business, with the name of the firm and words "Limited Partners." In New York and Ohio, if a proper sign is not posted, a person suing the firm may amend his pleadings without costs by correcting the number and names of the partners. In Missouri, the partnership becomes general. Compare Civ. Code S. C. 1902, § 1705. See references in note 20, p. 597, above.

<sup>64</sup> HOGAN v. HADZSITS, 113 Mich. 568, 71 N. W. 1092; Bally v. Hornthal, 154 N. Y. 648, 49 N. E. 56, 61 Am. St. Rep. 645. And so, also, under the early statutes. See "Partnership," Dec. Dig. (Key No.) § 364; Cent. Dig. § 844.

not reduce the amount of the capital,<sup>65</sup> and, indeed, this right would be implied in any case. In most states<sup>66</sup> he is expressly allowed to have both interest and profits, if this does not reduce the capital and a surplus remains to be divided; but an excessive division amounts to a withdrawal,<sup>67</sup> and the penalty for such withdrawal varies. In some states it is merely a liability to return the amount so withdrawn,<sup>68</sup> or a sum sufficient to make good his share of the capital.<sup>69</sup> In others he becomes liable as a general partner.<sup>70</sup> The sum for which he is thus liable he is bound to

<sup>65</sup> Connecticut (not exceeding 10 per cent., from the year's profits only), Massachusetts (not over 6 per cent.), Nebraska, Utah and Wisconsin (not over 12 per cent.), New Hampshire (annually or semi-annually), South Dakota, Indiana, Louisiana, and Mississippi. So under Rev. St. N. Y. 1829. See references in note 20, p. 597, above.

<sup>66</sup> Alabama, Arkansas, California, District of Columbia, Georgia, Hawaii, Idaho, Illinois, Iowa, Maryland, Missouri, Montana, Nebraska, New Jersey, New Mexico, New York, North Carolina, North Dakota, Ohio, Pennsylvania, South Carolina, Tennessee, Texas, Utah, Vermont, Wisconsin, and Wyoming. In Massachusetts, Mississippi, and Nevada this is directly to be implied from the statute. See references in note 20, p. 597, above.

<sup>67</sup> *Lachaise v. Marks*, 4 E. D. Smith (N. Y.) 610; *Bell v. Merrifield*, 28 Hun (N. Y.) 219. See "*Partnership*," *Dec. Dig. (Key No.)* § 364; *Cent. Dig.* § 844.

<sup>68</sup> Alaska, Colorado, Delaware, Indiana, Kansas, Kentucky (in substance), Maine, Massachusetts, Michigan, Minnesota, Nevada, Oregon, Rhode Island, Virginia and West Virginia (for a sum sufficient with the partnership effects to pay the debts of the firm, but not liable unless capital impaired), and Washington. See references in note 20, p. 597, above. *Snyder v. Leland*, 127 Mass. 291. So under Rev. St. N. Y. 1829. See "*Partnership*," *Dec. Dig. (Key No.)* § 364; *Cent. Dig.* §§ 841, 844.

<sup>69</sup> Alabama, District of Columbia, Georgia, Illinois, Iowa, Maryland, Mississippi (or be treated as a general partner), Nebraska, New Jersey, New Mexico, New York (or be liable as general partner for all debts contracted before restitution, up to the amount withdrawn), North Carolina, Ohio, Pennsylvania, Tennessee, Texas, Utah, Vermont, and Wisconsin. See references in note 20, p. 597, above.

<sup>70</sup> California, Hawaii, Idaho, Montana, New Hampshire, North Dakota, South Dakota, and Wyoming. See references in note 20, p. 597, above. *Madison County Bank v. Gould*, 5 Hill (N. Y.) 314; *Bell v. Merrifield*, 28 Hun (N. Y.) 223; *Haviland v. Chace*, 39 Barb. (N. Y.) 283; *Hogg v. Orgill*, 34 Pa. 344. See "*Partnership*," *Dec. Dig. (Key No.)* § 364; *Cent. Dig.* § 844.

restore, with interest,<sup>71</sup> or, in a few states, without interest.<sup>72</sup>

## RIGHTS AND LIABILITIES

**221. The liability of general partners is the same as in ordinary partnerships.**

Where all the statutory requirements have been complied with, special partners are not personally liable for partnership obligations.

As among themselves the rights and liabilities of the partners depend upon the terms of the partnership agreement, as we have already seen, and the liability of the general partners is the same as in a common partnership. This is sometimes definitely stated in the statutes.<sup>73</sup> It is to the general partners that the duty of management is intrusted, and to them that the firm capital belongs.<sup>74</sup> The special partner is not entitled to take any part in the management of the firm, though he may examine into its affairs and act in an advisory capacity to the general partners;<sup>75</sup> but he

<sup>71</sup> Colorado, District of Columbia, Maryland, Massachusetts, Michigan, Minnesota, Nebraska, Nevada, New Jersey, New York, Ohio, Oregon, Pennsylvania, Rhode Island, Texas, Utah, Virginia, Washington, and Wisconsin. See references in note 20, p. 597, above.

<sup>72</sup> Alabama, Georgia, Illinois, Iowa, North Carolina, and Tennessee. See references in note 20, p. 597, above.

<sup>73</sup> Liability of general partners same as in a general partnership. California, Hawaii, Idaho, Louisiana, Missouri, Montana, New York, North Dakota, Panama and Canal Zone, South Dakota, and Wyoming. See references in note 20, p. 597, above.

Liability is to account to each other and to special partners. Alabama, Arkansas (as other partners now are by law), District of Columbia, Georgia, Illinois, Indiana, Iowa, Kansas, Maryland, Maine, Mississippi, Missouri, Nebraska, New Jersey, New Mexico, New York, North Carolina, Ohio, Pennsylvania, South Carolina, Tennessee, Texas, Utah, and Wisconsin. So, also, under Laws N. Y. 1822, c. 244, § 10; Laws Conn. 1822, c. 21, § 5; Rev. St. N. Y. 1829.

<sup>74</sup> *BRADBURY v. SMITH*, 21 Me. 117. See "*Partnership*," *Dec. Dig. (Key No.)* §§ 367-369; *Cent. Dig.* §§ 840, 846, 847.

<sup>75</sup> Alabama, Arkansas, California, District of Columbia, Georgia, Hawaii, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Maryland, Michigan, Minnesota, Mississippi, Montana, Nebraska, New

must not make contracts for the firm,<sup>76</sup> or transact any partnership business otherwise than as expressly authorized by the statute,<sup>77</sup> nor be employed for that purpose as agent or attorney.<sup>78</sup> In two states he is allowed to act as attorney in fact, under a power of attorney,<sup>79</sup> and in five Southern states it is provided that a lawyer who is a special partner may act as adviser and attorney at law.<sup>80</sup> If a special partner interferes in the business, otherwise than as permitted by the statute, he becomes liable as a general partner.<sup>81</sup>

Jersey, New Mexico, New York, North Carolina, North Dakota, Ohio, Pennsylvania, South Carolina, South Dakota, Tennessee, Texas, Utah, Virginia, West Virginia, Wisconsin, and Wyoming. See references in note 20, p. 597, above. So under Laws N. Y. 1822, c. 244, § 6; Laws Conn. 1822, c. 21, § 3.

<sup>76</sup> Delaware, Indiana, Kentucky, Maine, Michigan, Montana, New Jersey, Rhode Island, and West Virginia. In Oregon and Washington, he may make contracts for the firm if he acted and was recognized as a special partner only. In Minnesota, New Jersey, and New York, he may negotiate sales or make purchases for the partnership, with the approval of one or more of the general partners. In the last two states his contracts are not binding on the firm till approved by a general partner. See references in note 20, p. 597, above; also see note 81, below.

<sup>77</sup> Alabama, Arkansas, Georgia, Indiana, Iowa, Kansas, Kentucky, Louisiana, Minnesota, Mississippi, New Jersey, North Carolina, Ohio, Panama and Canal Zone, Pennsylvania, South Carolina, Utah, West Virginia, Wisconsin, and Wyoming. See references in note 20, p. 597, above. So under Laws N. Y. 1822, c. 244, § 5, and Rev. St. N. Y. 1829.

<sup>78</sup> Alabama, Georgia, Indiana, Iowa, Kansas, Louisiana, Massachusetts, Nebraska, New Jersey, New York, North Carolina, Ohio, Pennsylvania, Tennessee, Virginia, West Virginia, and Wisconsin. So under Laws N. Y. 1822, c. 244, § 5. In Minnesota, he may not act as agent or attorney for the partnership unless specially authorized; in Ohio, he may, if he discloses his agency. In Illinois, Ohio, and Tennessee, he must have the consent of all the general partners. See references in note 20, p. 597, above.

<sup>79</sup> Illinois and Tennessee. See references in note 20, p. 597, above.

<sup>80</sup> Alabama, Georgia, Mississippi, and North and South Carolina.

<sup>81</sup> Alabama, Arkansas, Georgia, Indiana, Iowa, Kansas, Maryland, Minnesota, Mississippi, New Jersey (unless specially employed in writing by the general partners to do so), New York, North Carolina, Ohio, Pennsylvania, Panama and Canal Zone, Tennessee, Utah, and Wisconsin. So under Laws N. Y. 1822, c. 244, § 5, and Rev. St. N. Y. 1829. In Montana, Nevada, New Hampshire, Oregon, and

Some states allow a special partner to deal with the firm like any stranger,<sup>82</sup> and in some, loans by a special partner to the firm are authorized, and it is provided that as to these the special partner shall stand on the same footing as any other creditor in case of insolvency.<sup>83</sup> Other states do not allow this, and hold that a special partner cannot become a creditor of his firm and share with the other creditors in case of insolvency.<sup>84</sup> In seven Western jurisdictions<sup>85</sup> the provisions as to a special partner's liabilities are somewhat differently phrased. He is liable as a general partner to all the firm creditors if he has willfully made or permitted a false or materially defective statement in the certificate, affidavit, or published statement, or has willfully interfered with the business of the firm, except by investigating or advising as to its affairs, or loaning it money, or has willfully joined in or assented to a violation of the statute. If he has unintentionally done any of these things, he is liable as a general partner to any creditor of the firm who has been actually misled thereby to his prej-

Rhode Island, and a few other states, it is provided that if he personally makes contracts with any one except the general partners he shall be liable as a general partner. So in Vermont, unless he notifies the person at the time he is acting as a special partner only, and in Washington unless he can show when sued that in making the contract he acted and was recognized as a special partner. See note 76, p. 629, and references in note 20, p. 597, above.

<sup>82</sup> *Rayne v. Terrell*, 33 La. Ann. 812; *METROPOLITAN NAT. BANK OF NEW YORK v. SIRRET*, 97 N. Y. 320. See "*Partnership*," *Dec. Dig. (Key No.)* § 366; *Cent. Dig.* § 839.

<sup>83</sup> California, Hawaii, Idaho, Illinois, Michigan, Maine (as to loans by him to firm or use of his credit for its benefit), Montana, New Jersey (by P. L. 1859, p. 335), New York, North and South Dakota, Virginia (like Minnesota, statute apparently contradictory; compare sections 2871-2873), and Wyoming. See references in note 20, p. 597, above.

<sup>84</sup> Alabama, Connecticut, District of Columbia, Georgia, Kentucky, Maryland, Mississippi, Missouri, Nebraska, New Hampshire, New Mexico, North Carolina, Ohio, Pennsylvania, Rhode Island, South Carolina, Tennessee, Texas, Utah, West Virginia, and Wisconsin. See references in note 20, p. 597, above. So by Laws N. Y. 1822, c. 244, § 11; Laws Conn. 1822, c. 11, § 5; Rev. St. N. Y. 1829.

<sup>85</sup> California, Hawaii, Idaho, Montana, North and South Dakota, and Wyoming. See references in note 20, p. 597, above.

udice. In six of these jurisdictions<sup>86</sup> there is a provision by which he may protect himself from liability. One who, upon making a contract with a partnership, accepts from or gives to it a written memorandum of the contract, stating that the partnership is special and giving the names of the special partners, cannot afterwards charge the persons thus named as general partners upon that contract by reason of an error or defect in the proceedings for the creation of the partnership prior to the acceptance of the memorandum, if an effort has been made by the partners in good faith to form a special partnership in the manner required by the statute. If, on account of the failure to fulfill the statutory requirements, liability as a general partner attaches to a special partner, this liability continues even after death,<sup>87</sup> and even although the partnership is continued after the period named in the certificate.<sup>88</sup> But this imposing of a general liability upon a special partner does not have the effect of changing the firm into a general partnership. The relations of the partners among themselves are not changed, and the special partners are treated as general ones only so far as claimants are concerned.<sup>89</sup>

### SAME—LIABILITY FOR FRAUD

**222.** Any partner, general or special, guilty of fraud in the affairs of the partnership, is by some statutes made civilly liable to the person injured.

<sup>86</sup> California, Idaho, Montana, North and South Dakota, and Wyoming.

<sup>87</sup> *Hotopp v. Huber*, 160 N. Y. 524, 55 N. E. 206. See "*Partnership*," *Dec. Dig. (Key No.)* § 371; *Cent. Dig.* § 848.

<sup>88</sup> *TILGE v. BROOKS*, 124 Pa. 178, 182, 16 Atl. 746, 2 L. R. A. 796, *Gilmore, Cas. Partnership*, 627. See "*Partnership*," *Cent. Dig.* § 842.

<sup>89</sup> *Waters v. Harris* (Super. N. Y.) 17 N. Y. Supp. 370. See, also, *Guillou v. Peterson*, 89 Pa. 163; *Deckert v. Chesapeake Western Co.*, 101 Va. 804, 45 S. E. 799; *Abendroth v. Van Dolsen*, 131 U. S. 66, 9 Sup. Ct. 619, 33 L. Ed. 57. See "*Partnership*," *Dec. Dig. (Key No.)* § 362; *Cent. Dig.* § 842.

In a number of states it is explicitly provided that any partner, general or special, who is guilty of fraud in the affairs of the partnership, shall be liable civilly to the person injured to the extent of his damage.<sup>90</sup> In some states he is also guilty of a misdemeanor.<sup>91</sup> A special partner is not, however, liable for torts of the firm, even although because of some violation of the statutes he may be subject to a general liability for its debts.<sup>92</sup>

### FRAUDULENT PREFERENCES

**223.** The statutes of most states prohibit the transfer of property of the firm, or of the general or special partners, in contemplation of insolvency of such firm or partner, with intent to create a preference over other creditors of the firm.

**224.** If a special partner concurs in a violation of the above prohibition, he is liable as a general partner.

It is very generally provided that any sale or conveyance made in contemplation of or after insolvency, and with the intention of giving a preference, is void, whether made to a creditor or to a general or special partner,<sup>93</sup> and regardless

<sup>90</sup> Alabama, Arkansas, Georgia, Illinois, Iowa, Kansas, Maryland, Nebraska, New Jersey, New Mexico, Ohio, Pennsylvania, South Carolina, Tennessee, Texas, and Wisconsin. See references in note 20, p. 597, above. So under Laws N. Y. 1822, c. 244, § 10; Rev. St. N. Y. 1829.

<sup>91</sup> Georgia, Iowa, Minnesota, North and South Dakota, and Tennessee. In Arkansas, Illinois, Kansas, Maryland, Nebraska, New Jersey, South Carolina, and Wisconsin, there is a similar provision; accompanied by a general statement that he shall be punishable by fine or imprisonment, in the discretion of the court. So under Rev. St. N. Y. 1829. Under Laws N. Y. 1822, c. 244, § 10, the offender was to forfeit one thousand dollars, half to the informer and half to the state. In Ohio, he is liable to a fine of five hundred dollars or imprisonment for six months or both. See references in note 20, p. 597, above.

<sup>92</sup> McKnight v. Ratcliff, 44 Pa. 156. See "*Partnership*," Dec. Dig. (Key No.) § 371; Cent. Dig. § 848.

<sup>93</sup> TRACY v. TUFFLY, 134 U. S. 206, 10 Sup. Ct. 527, 33 L. Ed.

of whether the person who received the preference had notice that a preference was intended;<sup>94</sup> and if the preference consists of the withdrawal by a special partner of his contribution during the insolvency of the firm, he may be sued individually, and the action will be regarded as an equitable proceeding to restore the amount withdrawn.<sup>95</sup> But bona fide purchasers for value without notice of the property of an insolvent limited partnership are protected,<sup>96</sup> and an attaching creditor may, of course, obtain a preference, at any time before the appointment of a receiver, by the usual method of obtaining an execution and making a levy, and, where the debtor has not made a confession of judgment, a preference so obtained is not voidable.<sup>97</sup>

The New York Revised Statutes of 1829 contained the following provision, altered from a somewhat similar provision in Laws 1822, c. 244, § 9: "Every sale, assignment or transfer of any of the property or effects of such partnership, made by such partnership when insolvent, or in contemplation of insolvency, or after, or in contemplation of the insolvency of any partner, with the intent of giving a preference to any creditor of such partnership or insolvent partner, over other creditors of such partnership; and every judgment confessed, lien created, or security given, by such partnership, under like circumstances, and with like intent, shall be void, as against the creditors of such partnership."

The revision commissioners who drafted this section observed in their report of November 2, 1827,<sup>98</sup> in regard to

879; *Corbin v. Boles* (C. C.) 34 Fed. 692. See "*Partnership*," *Dec. Dig.* (Key No.) § 373; *Cent. Dig.* § 850.

<sup>94</sup> *George v. Grant*, 20 Hun (N. Y.) 372. See "*Partnership*," *Dec. Dig.* (Key No.) §§ 373, 374; *Cent. Dig.* §§ 850, 851.

<sup>95</sup> *Bell v. Merrifield*, 100 N. Y. 202, 16 N. E. 55, 4 Am. St. Rep. 436; *CROUCH v. FIRST NAT. BANK*, 156 Ill. 342, 40 N. E. 974. See "*Partnership*," *Dec. Dig.* (Key No.) §§ 849-851; *Cent. Dig.* §§ 372-374.

<sup>96</sup> *State Bank of Virginia v. Blanchard*, 90 Va. 22, 17 S. E. 742. See "*Partnership*," *Dec. Dig.* (Key No.) § 373; *Cent. Dig.* § 850.

<sup>97</sup> *Van Alstyne v. Cook*, 25 N. Y. 489. See "*Partnership*," *Dec. Dig.* (Key No.) §§ 372-374; *Cent. Dig.* §§ 849-851.

<sup>98</sup> Volume 4.

this and the two following sections: "These three last sections are intended as a substitute for the ninth section of the original act. These sections, as drawn, are somewhat complex, from the nature of the subject; but it is believed that they express the true intent of the Legislature, and present no difficulties which an attentive perusal will not solve."

A following section contained a provision in similar language that every transfer of the property of a general or special partner when insolvent or in contemplation of insolvency, or after or in contemplation of the insolvency of the partnership, with the intent of giving any creditor of his own or of the partnership a preference over partnership creditors, should also be void. These two sections have been followed almost literally in many states.\*\*

If a special partner violates these provisions or concurs in a violation of them, he is liable as a general partner.<sup>1</sup>

\*\* As to preferences by the partnership: Alabama, California, District of Columbia ("or in contemplation of the insolvency of any general partner") Georgia, Idaho, Iowa, Maryland, Minnesota, Missouri, Montana, Nebraska, New Jersey, New Mexico, New York, North Dakota, Ohio, Pennsylvania, South Carolina, South Dakota, Tennessee (in substance), Texas, Virginia, West Virginia (in substance), Wisconsin, and Wyoming. See references in note 20, p. 597, above. A similar provision is in the Illinois statute.

As to preferences by a partner: Alabama, California, District of Columbia, Georgia, Idaho, Illinois (similar in general), Iowa, Maryland, Maine, Missouri, Montana, Nebraska, New Jersey, New York, North Dakota, Pennsylvania, South Carolina, South Dakota, Tennessee (in substance), Texas, Virginia, West Virginia (in substance), Wisconsin, and Wyoming. This provision is omitted in New Mexico and Ohio. In some of these states the two sections are consolidated. In Kentucky there is a general provision making preferences void, applicable to all partnerships.

<sup>1</sup> Alabama, District of Columbia, Georgia, Iowa, Maryland, Maine, Nebraska, New Jersey, New Mexico, New York, Ohio, Pennsylvania, South Carolina, Tennessee, Texas, and Wisconsin. So by Laws N. Y. 1822, c. 244, § 9; Rev. St. N. Y. 1829. A substantially similar provision is in the Codes of California, Hawaii, Idaho, Montana, North and South Dakota, and Wyoming. See references in note 20, p. 597, above. *Böwen v. Argall*, 24 Wend. (N. Y.) 503; *Pusey v. Dusenbury*, 75 Pa. 437; *McArthur v. Chase*, 13 Grat. (Va.) 683. See "*Partnership*," *Dec. Dig. (Key No.)* § 373; *Cent. Dig.* § 850.

## ASSIGNMENTS FOR BENEFIT OF CREDITORS

**225.** Although the cases are not unanimous, it is held by some that assignments for the benefit of creditors cannot be made without the assent of all the partners, general and special.

Assignments for the benefit of creditors may be made by limited partnerships, as by general partnerships, except that, as the special partner is liable only to the extent of his contribution, his individual property need not be included in the assignment.<sup>2</sup>

In some states there is an additional provision that a general assignment by the partnership for the benefit of its creditors shall be void, unless it provides for a proportionate distribution of the assets among all the creditors, or unless the assets are sufficient to pay the debts.<sup>3</sup>

The assignment, like other acts for the firm, should be made by all of the general partners, and it seems that the assent of the special partner is necessary, though the cases on this point are not unanimous.<sup>4</sup>

The theory upon which the courts proceed, as will be seen by the cases previously cited, is that in case of insolvency the property of the firm is regarded as a trust fund for the benefit of the creditors, to be distributed among them pro rata by means of proceedings in equity, and these

<sup>2</sup> *TRACY v. TUFFLY*, 134 U. S. 206, 10 Sup. Ct. 527, 33 L. Ed. 879. See "*Partnership*," *Dec. Dig. (Key No.)* § 373; *Cent. Dig.* § 850; "*Assignments for Benefit of Creditors*," *Dec. Dig. (Key No.)* § 27; *Cent. Dig.* §§ 92, 93.

<sup>3</sup> Delaware, Indiana, Michigan, Nevada, and Rhode Island. In Indiana, Michigan, and Nevada the statute provides for implied assent after sixty days by creditors with notice, and for notice by publication. In most of these statutes provision is made for giving a first claim to the United States on bonds for duties.

<sup>4</sup> *Bowen v. Argall*, 24 Wend. (N. Y.) 496; *Mills v. Argall*, 6 Paige (N. Y.) 577; *Hayes v. Heyer*, 3 Sandf. (N. Y.) 284; *Darrow v. Bruff*, 36 How. Prac. (N. Y.) 479. See "*Partnership*," *Dec. Dig. (Key No.)* § 373; *Cent. Dig.* § 850; "*Assignments for Benefit of Creditors*," *Dec. Dig. (Key No.)* § 27; *Cent. Dig.* §§ 92, 93.

proceedings may be begun at the instance of a creditor, or of one of either class of partners.<sup>6</sup>

## DISSOLUTION

**226.** No dissolution by the voluntary act of the partners can take place before the time specified in the certificate, until a notice of such dissolution is filed and recorded, and also, in most states, duly published.

### *Dissolution*

A limited partnership may not voluntarily dissolve before the time stated in the certificate has expired, without filing and publishing a notice of dissolution. In most states it is provided in substance that no dissolution by the voluntary act of the partners shall take place before the time of termination specified in the certificate of formation or renewal,<sup>6</sup> until a notice of dissolution has been recorded where the original certificate was recorded,<sup>7</sup> and published

<sup>6</sup> *Innes v. Lansing*, 7 Paige (N. Y.) 583. See "Partnership," *Dec. Dig. (Key No.)* § 373; *Cent. Dig.* §§ 849, 850; "Assignments for Benefit of Creditors," *Dec. Dig. (Key No.)* § 27; *Cent. Dig.* §§ 92, 93.

<sup>6</sup> Alabama, Alaska, California, Colorado, Delaware, District of Columbia, Georgia, Illinois, Indiana, Iowa, Kansas, Kentucky, Maine, Maryland (except by an alteration), Massachusetts, Michigan, Mississippi (except in a suit by a partner), Missouri (may be dissolved, but not to take effect), Nebraska, New Hampshire, Nevada, New Jersey, New Mexico, North Carolina, Ohio (except by suit), Oregon, Pennsylvania, Rhode Island, South Carolina, Tennessee, Texas, Utah, Vermont, Washington, West Virginia, and Wisconsin. So, also, by Rev. St. N. Y. 1829. In Hawaii, Idaho, Montana, New York, North Dakota, South Dakota, Virginia, and Wyoming it is declared that a limited partnership is subject to dissolution like a general partnership, except that no dissolution by act of the partners is complete till notice of dissolution is recorded and published. See references in note 20, p. 597, above.

<sup>7</sup> Alabama, Alaska, California, Delaware (in each county), District of Columbia, Georgia, Hawaii, Illinois, Indiana, Iowa, Kansas (in each county), Maryland, Massachusetts, Michigan, Maine, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, New York (filed only), North Carolina, North Dakota, Ohio, Oregon (filed only), Pennsylvania, Rhode Island, South Carolina, Tennessee, Tex-

for three <sup>9</sup> or four <sup>9</sup> or six <sup>10</sup> weeks, or for some other period of time,<sup>11</sup> or for the period required for the publication of the original certificate,<sup>12</sup> in a newspaper published in each county where the partnership has a place of business.<sup>13</sup> A limited partnership may, however, be dissolved by operation of law in the same way and for the same reasons as a general partnership,<sup>14</sup> or by proceedings brought to dis-

as, Utah, Vermont, Virginia, Washington (filed only), West Virginia, Wisconsin, and Wyoming. So under Rev. St. N. Y. 1829. See references in note 20, p. 597, above.

<sup>9</sup> Alabama, Nevada (in county where certificate filed), and New Hampshire (in a newspaper in general circulation in the county where the principal place of business is located). See references in note 20, p. 597, above.

<sup>10</sup> Rev. St. N. Y. 1829. California, Colorado (published in principal county, and filed in each), District of Columbia (in two papers designated by clerk), Georgia, Hawaii (in two Honolulu papers), Idaho, Iowa, Kentucky, Maryland, Missouri, Montana, Nebraska, New Jersey, New Mexico, New York, North Carolina, North Dakota, Ohio, Pennsylvania, Texas, Utah, Virginia (or, if none published in the county, posted), Wisconsin, and Wyoming. See references in note 20, p. 597, above.

<sup>11</sup> Delaware (within the state), Illinois, Indiana, Kansas, Maine, Michigan, Rhode Island (in two papers within the state), and West Virginia. See references in note 20, p. 597, above.

<sup>12</sup> Mississippi: For thirty days in the county where the principal place of business is located "or a convenient county" (need not be recorded). South Carolina: For three months in the two newspapers most contiguous to the place or places where the partnership does business, and posted on the courthouse door. See references in note 20, p. 597, above.

<sup>13</sup> Alaska, Massachusetts, Minnesota, Oregon, Vermont, and Washington. See references in note 20, p. 597, above.

<sup>14</sup> In Massachusetts an affidavit of publication must be made and filed. In Michigan and North Carolina, the provisions for publishing the notice of dissolution differ from the provisions for publishing the terms of the certificate—in Michigan, in providing that, if no newspaper is published in the home county, the notice of dissolution may be published at the seat of government; in North Carolina, by requiring publication in the nearest newspaper to each place of business. See references in note 20, p. 597, above. Under Rev. St. N. Y. 1829, publication in the "state paper" was also required. In Laws N. Y. 1822, c. 244, § 6, and Laws Conn. 1822, c. 21, § 3, there were merely discretionary provisions for recording.

<sup>15</sup> *Jacquín v. Buisson*, 11 How. Prac. (N. Y.) 385; *AMES v. DOWNING*, 1 Bradf. Sur. (N. Y.) 321, *Gilmore, Cas. Partnership*,

solve it for reasons sufficient to justify the dissolution of a general partnership.<sup>15</sup>

### SAME—DEATH OF PARTNER

227. The statutes generally do not prevent dissolution by operation of law, and if either a general or a special partner dies the partnership is dissolved, as in the case of an ordinary partnership. Some statutes, however, contain provisions affecting this rule.

In Illinois the partnership articles may provide what shall be the relative rights of heirs and legal representatives on the death of a general partner, and may provide for a continuation of the business. In the absence of a provision on the latter subject, the business may be continued in the manner provided by the statute. If there is no contrary provision on the former subject, the heirs or legal representatives of a general partner are to be treated as being in the situation of a special partner.

In Minnesota the certificate may provide that the death of a partner shall not dissolve the partnership, in which case it may be continued by the surviving partners as a limited partnership till the expiration of the period fixed. In New York the business may be continued if the partnership articles so provide and the deceased partner's representatives consent.

In Missouri, after the death of a general partner, the surviving partners may purchase his interest from his legal representatives at a valuation determined by three appraisers appointed by the probate court.

In Pennsylvania the legal representatives of a general

610. See "*Partnership*," *Dec. Dig. (Key No.)* § 376; *Cent. Dig.* §§ 843, 862.

<sup>15</sup> *CONTINENTAL NAT. BANK OF BOSTON v. STRAUSS*, 137 N. Y. 148, 32 N. E. 1066; *Tournade v. Methfessel*, 3 Hun (N. Y.) 144. See "*Partnership*," *Dec. Dig. (Key No.)* § 376; *Cent. Dig.* §§ 862, 863.

partner may dispose of his interest for the benefit of his estate. The firm name must be changed, and the case treated as an alteration, and a certificate must be recorded and published accordingly.

In Virginia a partnership is not dissolved by the death of one or more of the special partners, unless it is expressly so stated in the certificate or "paper."<sup>16</sup>

### SAME—ADMISSION OF NEW PARTNERS

**228.** In a few states there are statutory provisions for the admission of new special partners upon a new certificate, signed by each of them and by the general partners, being verified or proved, acknowledged, and recorded, and published.<sup>17</sup>

In New York new special partners may be added, if a new certificate is filed, signed by all the general partners and sworn to by one of them, and an affidavit of payment of capital made by one of them is also filed. No publication is required.<sup>18</sup> There is a similar provision in Hawaii. In Indiana a neglect to record the certificate of any increase of capital or of a sale of a special partner's interest does not dissolve the firm; or make the special partners liable as general partners. Any change in the number of partners, however, unless specially authorized by statute and carried out in the manner provided, amounts to an alteration and makes all the partners generally liable if the partnership is carried on after that date.<sup>19</sup>

<sup>16</sup> For Pennsylvania, see 2 Purdon's Dig. (13th Ed., 1903) pp. 2299-2305, paragraph 27. For the other states, see references in note 20, p. 597, above.

<sup>17</sup> California, Idaho, Indiana (or general partners), Montana, and Wyoming. See references in note 20, p. 597, above.

<sup>18</sup> So, also, in North and South Dakota, where, however, the certificate must be signed by each new special partner and all the general partners. Apparently an affidavit is not required. See reference in note 20, p. 597, above.

<sup>19</sup> PERTH AMBOY MFG. CO. v. CONDIT, 21 N. J. Law, 659;

### SAME—SALE OF PARTNER'S INTEREST

229. In the absence of contract or statutory provision to the contrary, the conveyance of any partner's interest in a limited partnership works a dissolution, as in the case of an ordinary partnership.

In some states it is provided that a special<sup>20</sup> or general<sup>21</sup> partner, or either,<sup>22</sup> may sell his interest without the partnership being dissolved or the special partners rendered liable as general. In most states the consent of the other partners is required.

### MISCELLANEOUS STATUTORY PROVISIONS

230. In addition to the foregoing, there are miscellaneous provisions peculiar to the statutes of a few states. Some of the more important are noted below.

BUCK v. ALLEY, 145 N. Y. 494, 40 N. E. 236; Haddock v. Grinnell Mfg. Corp., 109 Pa. 380, 1 Atl. 174. See "*Partnership*," *Dec. Dig. (Key No.)* §§ 362, 363; *Cent. Dig.* §§ 836, 838, 842, 843.

<sup>20</sup> Indiana, Kansas, New Jersey, New York, and Pennsylvania. In New York and New Jersey, a notice of the sale must be filed within ten days. In Kansas and New Mexico, all the partners must indorse their consent on the certificate, and it must be noted on the margin of the record. In Pennsylvania, the written consent of all the partners to the sale must be obtained. This may be given in advance in the articles of partnership, or in a separate paper. In New York, the sale may be by the legal representatives of a deceased special partner. See references in note 20, p. 597, above.

<sup>21</sup> New Jersey (must file new certificate, and affidavit that there has been no withdrawal by any special partner) and Pennsylvania (by deed or will, with other partners' written consent, which may be given in advance). In Pennsylvania, the legal representatives of a deceased partner may sell his interest. A sale is treated as an alteration. See references in note 20, p. 597, above.

<sup>22</sup> Michigan: A general or special partner may sell his interest to any like partner or other person, and the firm name thus be altered, provided a full certificate is filed and published and an affidavit made. See reference in note 20, p. 597, above.

In California and New Mexico <sup>22</sup> married women may be special partners with their husbands or other persons. In Illinois <sup>22</sup> it is expressly provided, as is true by implication in every state, that a partner may bring suit to dissolve the firm on account of his partner's fraud. In Indiana <sup>22</sup> there are special provisions, not confined to limited partnerships, for a surviving partner's winding up the business. In Louisiana <sup>22</sup> the certificate must be recorded within six days after execution, and there are special provisions for the time for recording it in other counties. A partner in commendam may withdraw his capital if the firm attempts to use his name, and is no longer liable if he publishes notice of withdrawal in two newspapers. In Massachusetts and Ohio <sup>22</sup> there are special provisions for acknowledgment of the certificate where one or more partners reside outside the state. In Massachusetts and Missouri <sup>22</sup> the new certificate on renewal should state simply that the capital of the firm equals or exceeds the original amount. In Massachusetts it should state that this is true as to each special partner's contribution, while in Missouri it must state how much then stands to the credit of the special partners. In Mississippi <sup>22</sup> special partners may be joined in a suit against the firm, but a special partner may plead the contract of partnership in defense, and be held only to the extent of his liability, deducting any debts he has previously paid. In New Jersey <sup>22</sup> there is a special provision for additional renewals. In New York <sup>22</sup> it is provided that a special partner may lease to the general partners. In North Carolina and Virginia <sup>22</sup> the affidavit filed at renewal may state that the capital was originally paid in cash in good faith, and is now represented by goods or merchandise. In Ohio <sup>22</sup> any limited partnership engaged in manufacturing or mining may rent, cultivate, or improve its lands, as if this was within the scope of its regular business. In Pennsylvania <sup>22</sup> a notice relating to limited partnerships must be published in the county legal journal, if any. There are elaborate provisions for the taxation of limited partnerships. In Virginia <sup>22</sup> the certificate or "paper" is to be indexed under the name of each partner and

<sup>22</sup> See references in note 20, p. 597, above.

the firm name in the record. In Virginia and West Virginia there are elaborate provisions for disclosure of the principal by signs and published notices, when a business is conducted by an agent.<sup>23</sup> In many states there are recent statutes requiring the recording of the true names of persons doing business under other names than their own names, including arbitrary and fictitious names, and names suggesting a firm or corporation. In other states there are provisions for "partnership associations" with transferable shares. These are really joint-stock companies, and not within the scope of this chapter. In Pennsylvania, besides limited partnerships and joint-stock companies, there is a special kind of "partnerships with limited liability," using in the name the word "Registered," and organized to do business within or without the state.<sup>24</sup> These registered partnerships are simply another form of quasi-corporation, practically similar to joint-stock associations.

#### *Insolvency of Special Partner*

In Indiana and Pennsylvania the statutes contain a provision that the insolvency of a special partner shall not dissolve the firm, but his interest may be sold by his assignee or trustee.<sup>25</sup> This seems a wise and useful provision, for otherwise it would seem that the insolvency of a special partner must work a dissolution of the firm, except in states which permit the sale of a special partner's interest. The insolvency of a general partner always works a dissolution by operation of law.<sup>26</sup>

<sup>23</sup> See references in note 20, p. 597, above.

<sup>24</sup> 2 Purdon's Dig. (13th Ed., 1903) pp. 3464-3467.

<sup>25</sup> See reference in note 24, above.

<sup>26</sup> *Wilkins v. Davis*, 2 Low. 511, Fed. Cas. No. 17,664. See "Partnership," Dec. Dig. (Key No.) §§ 271. 372; Cent. Dig. §§ 616. 849.

### ACTIONS—BETWEEN MEMBERS—BETWEEN FIRM AND THIRD PERSONS

231. Actions between members of a limited partnership are subject to substantially the same rules as apply to actions between members of a general partnership.
232. Actions between the firm and third persons may be brought by and against the general partners only.

All suits brought by or against a properly formed limited partnership, either while it is a going concern or in proceedings instituted to wind up its affairs, should be brought in the names of the general partners only, in the same manner as if there were no special partners.<sup>27</sup> In some states the statutes on this point are mandatory,<sup>28</sup> and in others permissive.<sup>29</sup> Where, however, a special partner has made himself liable as a general partner, he should join or be joined as plaintiff or defendant as the case may be.<sup>30</sup> And in some states he should be so joined when he

<sup>27</sup> *Lawrence v. Batcheller*, 131 Mass. 504; *Richter v. Poppenhausen*, 42 N. Y. 373. See "*Partnership*," *Dec. Dig. (Key No.)* § 375; *Cent. Dig.* § 854.

<sup>28</sup> Alabama, Alaska, Arkansas, California, Colorado, Connecticut, Delaware, District of Columbia, Georgia, Hawaii, Idaho, Illinois, Indiana, Kansas, Kentucky, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi (applicable only to suits against the firm; option to join any special partners), Nevada, New Hampshire, Ohio, Oregon, Pennsylvania, Rhode Island, South Carolina, Vermont (against the firm), Virginia, Washington, and West Virginia. See references in note 20, p. 597, above. So under Laws N. Y. 1822, c. 244, § 13; Laws Conn. 1822, c. 21, § 6; Rev. St. N. Y. 1829.

<sup>29</sup> Iowa, Missouri, Montana, Nebraska, New Jersey, New Mexico, New York, North Carolina, North Dakota, South Dakota, Tennessee, Texas, Utah, Wisconsin, and Wyoming. See references in note 20, p. 597, above.

<sup>30</sup> Alaska, Colorado, Connecticut, Delaware, District of Columbia, Georgia, Illinois, Indiana, Kentucky, Maryland, Maine, Massachusetts, Michigan, Minnesota, Missouri, Nevada, New Hampshire, Ohio (special partner, liable as general, may sue or be sued), Oregon, Rhode Island, South Carolina, Vermont, Virginia, Washington (all partners may join), and West Virginia. In Georgia, the provision is express that in such cases one or more of the special partners may

is liable for sums received or withdrawn from the capital.<sup>21</sup> In others, however, the suit should be against the special partner individually;<sup>22</sup> and this would seem to be the better rule where there is no statutory provision, for the special partner does not have the rights in the firm that a general partner has, but is regarded as having a status more like that of the stockholder of a corporation. His individual rights and liabilities should consequently be settled by individual suits, except in cases where he has become by operation of law subject to the liabilities of a general partner; and even then, as the imposing of general liability does not confer full partnership rights, he should sue individually. Other provisions on this subject are referred to in the note below.<sup>23</sup>

be joined as defendants. See references in note 20, p. 597, above. So, also, under Laws N. Y. 1822, c. 244, § 13; Laws Conn. 1822, c. 21, § 6. *Safe Deposit & Trust Co. v. Cahn*, 102 Md. 530, 62 Atl. 819; *Hotopp v. Huber*, 160 N. Y. 524, 55 N. E. 206. See "*Partnership*," *Dec. Dig. (Key No.)* § 375; *Cent. Dig.* § 854.

<sup>21</sup> Alaska, Colorado (in a suit by the other partners), Delaware, Illinois, Indiana, Maine (in substance), Massachusetts, Michigan, Minnesota, Nevada, Oregon, Rhode Island, Vermont, and Washington. See references in note 20, p. 597, above.

<sup>22</sup> *Robinson v. McIntosh*, 3 E. D. Smith (N. Y.) 221. See "*Partnership*," *Dec. Dig. (Key No.)* § 375; *Cent. Dig.* §§ 852, 854.

<sup>23</sup> In the District of Columbia and Maryland the general partners whose names appear in the firm name are the only necessary defendants. The effect is the same as if all the general partners were sued, and if any special partner is found not liable, judgment may be entered against the other partners only. If a special partner is afterwards found to be liable, a new suit may be brought against him, in which judgment is prima facie evidence of the amount due from the firm. There is a somewhat similar provision in Kentucky. In South Carolina, if a plaintiff joining a special partner as defendant fails to prove his liability, this is not ground for a nonsuit. In Virginia and West Virginia, the firm may sue a special partner on any debt as if he were not a partner. See references in note 20, p. 597, above.

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# THE UNIFORM PARTNERSHIP ACT

## PART I. PRELIMINARY PROVISIONS

**Section 1.—Name of Act.** This act may be cited as Uniform Partnership Act.

**Sec. 2.—Definition of Terms.** In this act, "Court" includes every court and judge having jurisdiction in the case.

"Business" includes every trade, occupation, or profession.

"Person" includes individuals, partnerships, corporations, and other associations.

"Bankrupt" includes bankrupt under the Federal Bankruptcy Act or insolvent under any state insolvent act.

"Conveyance" includes every assignment, lease, mortgage, or encumbrance.

"Real property" includes land and any interest or estate in land.

**Sec. 3.—Interpretation of Knowledge and Notice.** (1) A person has "knowledge" of a fact within the meaning of this act not only when he has actual knowledge thereof, but also when he has knowledge of such other facts as in the circumstances shows bad faith.

(2) A person has "notice" of a fact within the meaning of this act when the person who claims the benefit of the notice

(a) States the fact to such person, or

(b) Delivers through the mail, or by other means of communication, a written statement of the fact to such person or to a proper person at his place of business or residence.

**Sec. 4.—Rules of Construction.** (1) The rule that statutes in derogation of the common law are to be strictly construed shall have no application to this act.

(2) The law of estoppel shall apply under this act.

(3) The law of agency shall apply under this act.

(4) This act shall be so interpreted and construed as to effect its general purpose to make uniform the law of those states which enact it.

(5) This act shall not be construed so as to impair the obligations of any contract existing when the act goes into effect, nor to affect any action or proceedings begun or right accrued before this act takes effect.

**Sec. 5.—Rules for Cases not Provided for in this Act.** In any case not provided for in this act the rules of law and equity, including the law merchant, shall govern.

## PART II. NATURE OF A PARTNERSHIP

**Sec. 6.—Partnership Defined.** (1) A partnership is an association of two or more persons to carry on as co-owners a business for profit.

(2) But any association formed under any other statute of this state, or any statute adopted by authority, other than the authority of this state, is not a partnership under this act, unless such association would have been a partnership in this state prior to the adoption of this act; but this act shall apply to limited partnerships except in so far as the statutes relating to such partnerships are inconsistent herewith.

**Sec. 7.—Rules for Determining the Existence of a Partnership.** In determining whether a partnership exists, these rules shall apply:

(1) Except as provided by section 16 persons who are not partners as to each other are not partners as to third persons.

(2) Joint tenancy, tenancy in common, tenancy by the entireties, joint property, common property, or part ownership does not of itself establish a partnership, whether such co-owners do or do not share any profits made by the use of the property.

(3) The sharing of gross returns does not of itself establish a partnership, whether or not the persons sharing them have a joint or common right or interest in any property from which the returns are derived.

(4) The receipt by a person of a share of the profits of a business is prima facie evidence that he is a partner in the business, but no such inference shall be drawn if such profits were received in payment:

(a) As a debt by installments or otherwise,

(b) As wages of an employee or rent to a landlord,

(c) As an annuity to a widow or representative of a deceased partner,

(d) As interest on a loan, though the amount of payment vary with the profits of the business,

(e) As the consideration for the sale of the good-will of a business or other property by installments or otherwise.

**Sec. 8.—Partnership Property.** (1) All property originally brought into the partnership stock or subsequently acquired, by purchase or otherwise, on account of the partnership is partnership property.

(2) Unless the contrary intention appears, property acquired with partnership funds is partnership property.

(3) Any estate in real property may be acquired in the partnership name. Title so acquired can be conveyed only in the partnership name.

(4) A conveyance to a partnership in the partnership name, though without words of inheritance, passes the entire estate of the grantor unless a contrary intent appears.

### PART III. RELATIONS OF PARTNERS TO PERSONS DEALING WITH THE PARTNERSHIP

**Sec. 9.—Partner Agent of Partnership as to Partnership Business.** (1) Every partner is an agent of the partnership for the purpose of its business, and the act of every partner, including the execution in the partnership name of any instrument, for apparently carrying on in the usual way the business of the partnership of which he is a member binds the partnership, unless the partner so acting has in fact no authority to act for the partnership in the particular matter, and the person with whom he is dealing has knowledge of the fact that he has no such authority.

(2) An act of a partner which is not apparently for the carrying on of the business of the partnership in the usual way does not bind the partnership unless authorized by the other partners.

(3) Unless authorized by the other partners or unless they have abandoned the business, one or more but less than all the partners have no authority to:

- (a) Assign the partnership property in trust for creditors or on the assignee's promise to pay the debts of the partnership,
- (b) Dispose of the good-will of the business,
- (c) Do any other act which would make it impossible to carry on the ordinary business of the partnership,
- (d) Confess a judgment,
- (e) Submit a partnership claim or liability to arbitration or reference.

(4) No act of a partner in contravention of a restriction on his authority shall bind the partnership to persons having knowledge of the restriction.

**Sec. 10.—Conveyance of Real Property of the Partnership.** (1) Where title to real property is in the partnership name, any partner may convey title to such property, by a conveyance executed in the partnership name; but the partnership may recover such property unless the partner's act binds the partnership under the provisions of paragraph (1) of section 9, or unless such property has been conveyed by the grantee or a person claiming through such grantee to a holder for value without knowledge that the partner, in making the conveyance, has exceeded his authority.

(2) Where title to real property is in the name of the partnership, a conveyance executed by a partner, in his own name, passes the equitable interest of the partnership, provided the act is one within the authority of the partner under the provisions of paragraph (1) of section 9.

(3) Where title to real property is in the name of one or more but not all the partners, and the record does not disclose the right of the partnership, the partners in whose name the title stands may convey title to such property, but the partnership may recover such property if the partners' act does not bind the partnership under the provisions of paragraph (1) of section 9, unless the purchaser or his assignee, is a holder for value, without knowledge.

(4) Where the title to real property is in the name of one or more or all the partners, or in a third person in trust for the partnership, a conveyance executed by a partner in the partnership name, or in his own name, passes the equitable interest of the partnership, provided the act is one within the authority of the partner under the provisions of paragraph (1) of section 9.

(5) Where the title to real property is in the names of all the partners a conveyance executed by all the partners passes all their rights in such property.

**Sec. 11.—Partnership Bound by Admission of Partner.** An admission or representation made by any partner concerning partnership affairs within the scope of his authority as conferred by this act is evidence against the partnership.

**Sec. 12.—Partnership Charged with Knowledge of or Notice to Partner.** Notice to any partner of any matter relating to partnership affairs, and the knowledge of the partner acting in the particular matter, acquired while a partner or then present to his mind, and the knowledge of any other partner who reasonably could and should have communicated it to the acting partner, operate as notice to or knowledge of the partnership, except in the case of a fraud on the partnership committed by or with the consent of that partner.

**Sec. 13.—Partnership Bound by Partner's Wrongful Act.** Where, by any wrongful act or omission of any partner acting in the ordinary course of the business of the partnership, or with the authority of his co-partners, loss or injury is caused to any person, not being a partner in the partnership, or any penalty is incurred, the partnership is liable therefor to the same extent as the partner so acting or omitting to act.

**Sec. 14.—Partnership Bound by Partner's Breach of Trust.** The partnership bound to make good the loss:

(a) Where one partner acting within the scope of his apparent authority receives money or property of a third person and misapplies it; and

(b) Where the partnership in the course of its business receives money or property of a third person and the money or property so received is misapplied by any partner while it is in the custody of the partnership.

**Sec. 15.—Nature of Partner's Liability.** All partners are liable.

(a) Jointly and severally for everything chargeable to the partnership under sections 13 and 14.

(b) Jointly for all other debts and obligations of the partnership; but any partner may enter into a separate obligation to perform a partnership contract.

**Sec. 16.—Partner by Estoppel.** (1) When a person, by words spoken or written or by conduct, represents himself, or consents to another representing him to any one, as a partner in an existing partnership or with one or more persons not actual partners, he is liable to any such person to whom such representation has been made, who has, on the faith of such representation, given credit to the actual or apparent partnership, and if he has made such representation or consented to its being made in a public manner he is liable to such person, whether the representation has or has not been made or communicated to such person so giving credit by or with the knowledge of the apparent partner making the representation or consenting to its being made.

(a) When a partnership liability results, he is liable as though he were an actual member of the partnership.

(b) When no partnership liability results, he is liable jointly with the other persons, if any, so consenting to the contract or representation as to incur liability, otherwise separately.

(2) When a person has been thus represented to be a partner in an existing partnership, or with one or more persons not actual partners, he is an agent of the persons consenting to such representation to bind them to the same extent and in the same manner as though he were a partner in fact, with respect to persons who rely upon the representation. Where all the members of the existing partnership consent to the representation, a partnership act or obligation results; but in all other cases it is the joint act or obligation of the person acting and the persons consenting to the representation.

**Sec. 17.—Liability of Incoming Partner.** A person admitted as a partner into an existing partnership is liable for all the obligations of the partnership arising before his admission as though he had been a partner when such obligations were incurred, except that this liability shall be satisfied only out of partnership property.

#### PART IV. RELATIONS OF PARTNERS TO ONE ANOTHER

**Sec. 18.—Rules Determining Rights and Duties of Partners.** The rights and duties of the partners in relation to the partnership shall be determined, subject to any agreement between them, by the following rules:

(a) Each partner shall be repaid his contributions, whether by way of capital or advances to the partnership property and share equally in the profits and surplus remaining after all liabilities, including those to partners, are satisfied; and must contribute towards the losses, whether of capital or otherwise, sustained by the partnership according to his share in the profits.

(b) The partnership must indemnify every partner in respect of payments made and personal liabilities reasonably incurred by him in the ordinary and proper conduct of its business, or for the preservation of its business or property.

(c) A partner, who in aid of the partnership makes any payment or advance beyond the amount of capital which he agreed to contribute, shall be paid interest from the date of the payment or advance.

(d) A partner shall receive interest on the capital contributed by him only from the date when repayment should be made.

(e) All partners have equal rights in the management and conduct of the partnership business.

(f) No partner is entitled to remuneration for acting in the partnership business, except that a surviving partner is entitled to reasonable compensation for his services in winding up the partnership affairs.

(g) No person can become a member of a partnership without the consent of all the partners.

(h) Any difference arising as to ordinary matters connected with the partnership business may be decided by a majority of the partners; but no act in contravention of any agreement between the partners may be done rightfully without the consent of all the partners.

**Sec. 19.—Partnership Books.** The partnership books shall be kept, subject to any agreement between the partners, at the principal place of business of the partnership, and every partner shall at all times have access to and may inspect and copy any of them.

**Sec. 20.—Duty of Partners to Render Information.** Partners shall render on demand true and full information of all things affecting the partnership to any partner or the legal representative of any deceased partner or partner under legal disability.

**Sec. 21.—Partner Accountable as a Fiduciary.** (1) Every partner must account to the partnership for any benefit, and hold as trustee for it any profits derived by him without the consent of the other partners from any transaction connected with the formation, conduct, or liquidation of the partnership or from any use by him of its property.

(2) This section applies also to the representatives of a deceased partner engaged in the liquidation of the affairs of the partnership as the personal representatives of the last surviving partner.

**Sec. 22.—Right to an Account.** Any partner shall have the right to a formal account as to partnership affairs:

- (a) If he is wrongfully excluded from the partnership business or possession of its property by his co-partners,
- (b) If the right exists under the terms of any agreement,
- (c) As provided by section 21,
- (d) Whenever other circumstances render it just and reasonable.

**Sec. 23.—Continuation of Partnership Beyond Fixed Term.** (1) When a partnership for a fixed term or particular undertaking is continued after the termination of such term or particular undertaking without any express agreement, the rights and duties of the partners remain the same as they were at such termination, so far as is consistent with a partnership at will.

(2) A continuation of the business by the partners or such of them as habitually acted therein during the term, without any settlement or liquidation of the partnership affairs, is prima facie evidence of a continuation of the partnership.

#### PART V. PROPERTY RIGHTS OF A PARTNER

**Sec. 24.—Extent of Property Rights of a Partner.** The property rights of a partner are (1) his rights in specific partnership property, (2) his interest in the partnership, and (3) his right to participate in the management.

**Sec. 25.—Nature of a Partner's Right in Specific Partnership Property.** (1) A partner is co-owner with his partners of specific partnership property holding as a tenant in partnership.

(2) The incidents of this tenancy are such that:

(a) A partner, subject to the provisions of this act and to any agreement between the partners, has an equal right with his partners to possess specific partnership property for partnership purposes; but he has no right to possess such property for any other purpose without the consent of his partners.

(b) A partner's right in specific partnership property is not assignable except in connection with the assignment of the rights of all the partners in the same property.

(c) A partner's right in specific partnership property is not subject to attachment or execution, except on a claim against the partnership. When partnership property is attached for a partnership debt the partners, or any of them, or the representatives of a deceased partner, cannot claim any right under the homestead or exemption laws.

(d) On the death of a partner his right in specific partnership property vests in the surviving partner or partners, except where the deceased was the last surviving partner, when his right in such property vests in his legal representative. Such surviving partner or partners, or the legal representative of the last surviving partner, has no right to possess the partnership property for any but a partnership purpose.

(e) A partner's right in specific partnership property is not subject to dower, curtesy, or allowances to widows, heirs, or next of kin.

**Sec. 26.—Nature of Partner's Interest in the Partnership.** A partner's interest in the partnership is his share of the profits and surplus, and the same is personal property.

**Sec. 27.—Assignment of Partner's Interest.** (1) A conveyance by a partner of his interest in the partnership does not of itself dissolve the partnership, nor, as against the other partners in the absence of agreement, entitle the assignee, during the continuance of the partnership, to interfere in the management or administration of the partnership business or affairs, or to require any information or account of partnership transactions, or to inspect the partnership books; but it merely entitles the assignee to receive in accordance with his contract the profits to which the assigning partner would otherwise be entitled.

(2) In case of a dissolution of the partnership, the assignee is entitled to receive his assignor's interest and may require an account from the date only of the last account agreed to by all the partners.

**Sec. 28.—Partner's Interest Subject to Charging Order.** (1) On due application to a competent court by any judgment creditor of a partner, the court which entered the judgment, order, or decree, or any other court, may charge the interest of the debtor partner with payment of the unsatisfied amount of such

judgment debt with interest thereon; and may then or later appoint a receiver of his share of the profits, and of any other money due or to fall due to him in respect of the partnership, and make all other orders, directions, accounts and inquiries which the debtor partner might have made, or which the circumstances of the case may require.

(2) The interest charged may be redeemed at any time before foreclosure, or in case of a sale being directed by the court may be purchased without thereby causing a dissolution:

(a) With separate property, by any one or more of the partners, or

(b) With partnership property, by any one or more of the partners with the consent of all the partners whose interests are not so charged or sold.

(3) Nothing in this act shall be held to deprive a partner of his right, if any, under the exemption laws, as regards his interest in the partnership.

## PART VI. DISSOLUTION AND WINDING UP

**Sec. 29.—Dissolution Defined.** The dissolution of a partnership is the change in the relation of the partners caused by any partner ceasing to be associated in the carrying on as distinguished from the winding up of the business.

**Sec. 30.—Partnership Not Terminated by Dissolution.** On dissolution the partnership is not terminated, but continues until the winding up of partnership affairs is completed.

**Sec. 31.—Causes of Dissolution.** Dissolution is caused:

(1) Without violation of the agreement between the partners,

(a) By the termination of the definite term or particular undertaking specified in the agreement,

(b) By the express will of any partner when no definite term or particular undertaking is specified,

(c) By the express will of all the partners who have not assigned their interests or suffered them to be charged for their separate debts, either before or after the termination of any specified term or particular undertaking,

(d) By the expulsion of any partner from the business bona fide in accordance with such a power conferred by the agreement between the partners;

(2) In contravention of the agreement between the partners, where the circumstances do not permit a dissolution under any other provision of this section, by the express will of any partner at any time;

(3) By any event which makes it unlawful for the business of the partnership to be carried on or for the members to carry it on in partnership;

(4) By the death of any partner;

(5) By the bankruptcy of any partner or the partnership;

(6) By decree of court under section 32.

**Sec. 32.—Dissolution by Decree of Court.** (1) On application by or for a partner the court shall decree a dissolution whenever:

(a) A partner has been declared a lunatic in any judicial proceeding or is shown to be of unsound mind,

(b) A partner becomes in any other way incapable of performing his part of the partnership contract,

(c) A partner has been guilty of such conduct as tends to affect prejudicially the carrying on of the business,

(d) A partner willfully or persistently commits a breach of the partnership agreement, or otherwise so conducts himself in matters relating to the partnership business that it is not reasonably practicable to carry on the business in partnership with him,

(e) The business of the partnership can only be carried on at a loss,

(f) Other circumstances render a dissolution equitable.

(2) On the application of the purchaser of a partner's interest under sections 28 or 29:

(a) After the termination of the specified term or particular undertaking,

(b) At any time if the partnership was a partnership at will when the interest was assigned or when the charging order was issued.

**Sec. 33.—General Effect of Dissolution on Authority of Partner.** Except so far as may be necessary to wind up partnership affairs or to complete transactions begun but not then finished, dissolution terminates all authority of any partner to act for the partnership.

(1) With respect to the partners,

(a) When the dissolution is not by the act, bankruptcy or death of a partner; or,

(b) When the dissolution is by such act, bankruptcy or death of a partner, in cases where section 34 so requires.

(2) With respect to persons not partners, as declared in section 35.

**Sec. 34.—Right of Partner to Contribution From Co-partners After Dissolution.** Where the dissolution is caused by the act, death or bankruptcy of a partner, each partner is liable to his co-partners for his share of any liability created by any partner acting for the partnership as if the partnership had not been dissolved unless

(a) The dissolution being by act of any partner, the partner acting for the partnership had knowledge of the dissolution, or

(b) The dissolution being by the death or bankruptcy of a partner, the partner acting for the partnership had knowledge or notice of the death or bankruptcy.

**Sec. 35.—Power of Partner to Bind Partnership to Third Persons After Dissolution.** (1) After dissolution a partner can bind the partnership except as provided in paragraph (3)

(a) By any act appropriate for winding up partnership affairs or completing transactions unfinished at dissolution.

(b) By any transaction which would bind the partnership if dissolution had not taken place, provided the other party to the transaction

(I) Had extended credit to the partnership prior to dissolution and had no knowledge or notice of the dissolution; or

(II) Though he had not so extended credit, had nevertheless known of the partnership prior to dissolution, and, having no knowledge or notice of dissolution, the fact of dissolution had not been advertised in a newspaper of general circulation in the place (or in each place if more than one) at which the partnership business was regularly carried on.

(2) The liability of a partner under paragraph (1b) shall be satisfied out of partnership assets alone when such partner had been prior to dissolution

(a) Unknown as a partner to the person with whom the contract is made; and

(b) So far unknown and inactive in partnership affairs that the business reputation of the partnership could not be said to have been in any degree due to his connection with it.

(3) The partnership is in no case bound by any act of a partner after dissolution

(a) Where the partnership is dissolved because it is unlawful to carry on the business, unless the act is appropriate for winding up partnership affairs; or

(b) Where the partner has become bankrupt; or

(c) Where the partner has no authority to wind up partnership affairs, except by a transaction with one who

(I) Had extended credit to the partnership prior to dissolution and had no knowledge or notice of his want of authority; or

(II) Had not extended credit to the partnership prior to dissolution, and, having no knowledge or notice of his want of authority, the fact of his want of authority has not been advertised in the manner provided for advertising the fact of dissolution in paragraph (1b II).

(4) Nothing in this section shall affect the liability under section 16 of any person who after dissolution represents himself or consents to another representing him as a partner in a partnership engaged in carrying on business.

**Sec. 36.—Effect of Dissolution on Partner's Existing Liability.** (1) The dissolution of the partnership does not of itself discharge the existing liability of any partner.

(2) A partner is discharged from any existing liability upon dissolution of the partnership by an agreement to that effect between himself, the partnership creditor and the person or partnership continuing the business; and such agreement may be inferred from the course of dealing between the creditor having knowledge of the dissolution and the person or partnership continuing the business.

(3) Where a person agrees to assume the existing obligations of a dissolved partnership, the partners whose obligations have been assumed shall be discharged from any liability to any creditor of the partnership who, knowing of the agreement, consents to a material alteration in the nature or time of payment of such obligations.

(4) The individual property of a deceased partner shall be liable for all obligations of the partnership incurred while he was a partner but subject to the prior payment of his separate debts.

**Sec. 37.—Right to Wind Up.** Unless otherwise agreed the partners who have not wrongfully dissolved the partnership or the legal representative of the last surviving partner, not bankrupt, has the right to wind up the partnership affairs; provided, however, that any partner, his legal representative, or his assignee, upon cause shown, may obtain winding up by the court.

**Sec. 38.—Rights of Partners to Application of Partnership Property.** (1) When dissolution is caused in any way, except in contravention of the partnership agreement, each partner, as against his co-partners and all persons claiming through them in respect of their interests in the partnership, unless otherwise agreed, may have the partnership property applied to discharge its liabilities, and the surplus applied to pay in cash the net amount owing to the respective partners. But if dissolution is caused by expulsion of a partner, bona fide under the partnership agreement, and if the expelled partner is discharged from all partnership liabilities, either by payment or agreement under section 36 (2), he shall receive in cash only the net amount due him from the partnership.

(2) When dissolution is caused in contravention of the partnership agreement the rights of the partners shall be as follows:

(a) Each partner who has not caused dissolution wrongfully shall have,

(I) All the rights specified in paragraph (1) of this section, and

(II) The right, as against each partner who has caused the dissolution wrongfully, to damages for breach of the agreement.

(b) The partners who have not caused the dissolution wrongfully, if they all desire to continue the business in the same name, either by themselves or jointly with others, may do so, during the agreed term for the partnership and for that purpose may possess the partnership property, provided they secure the payment by bond approved by the court, or pay to any partner who has caused the dissolution wrongfully, the value of his interest in the partnership at the dissolution, less any damages recoverable under clause (2a II) of this section, and in like manner indemnify him against all present or future partnership liabilities.

(c) A partner who has caused the dissolution wrongfully shall have:

(I) If the business is not continued under the provisions of paragraph

(2b) all the rights of a partner under paragraph (1), subject to clause (2a II), of this section,

(II) If the business is continued under paragraph (2b) of this section the right as against his copartners and all claiming through them in respect of their interests in the partnership, to have the value of his interest in the partnership, less any damages caused to his co-partners by the dissolution, ascertained and paid to him in cash, or the payment secured by bond approved by the court, and to be released from all existing liabilities of the partnership; but in ascertaining the value of the partner's interest the value of the good-will of the business shall not be considered.

**Sec. 39.—Rights Where Partnership Is Dissolved for Fraud or Misrepresentation.** Where a partnership contract is rescinded on the ground of the fraud or misrepresentation of one of the parties thereto, the party entitled to rescind is, without prejudice to any other right, entitled,

(a) To a lien on, or right of retention of, the surplus of the partnership property after satisfying the partnership liabilities to third persons for any sum of money paid by him for the purchase of an interest in the partnership and for any capital or advances contributed by him; and

(b) To stand, after all liabilities to third persons have been satisfied, in the place of the creditors of the partnership for any payments made by him in respect of the partnership liabilities; and

(c) To be indemnified by the person guilty of the fraud or making the representation against all debts and liabilities of the partnership.

**Sec. 40.—Rules for Distribution.** In settling accounts between the partners after dissolution, the following rules shall be observed, subject to any agreement to the contrary:

(a) The assets of the partnership are:

(I) The partnership property,

(II) The contributions of the partners necessary for the payment of all the liabilities specified in clause (b) of this paragraph.

(b) The liabilities of the partnership shall rank in order of payment, as follows:

(I) Those owing to creditors other than partners,

(II) Those owing to partners other than for capital and profits,

(III) Those owing to partners in respect of capital,

(IV) Those owing to partners in respect of profits.

(c) The assets shall be applied in the order of their declaration in clause (a) of this paragraph to the satisfaction of the liabilities.

(d) The partners shall contribute, as provided by section 18 (a) the amount necessary to satisfy the liabilities; but if any, but not all, of the partners are insolvent, or, not being subject to process, refuse to contribute, the other partners shall contribute their share of the liabilities, and, in the relative proportions in which they share the profits, the additional amount necessary to pay the liabilities.

(e) An assignee for the benefit of creditors or any person appointed by the court shall have the right to enforce the contributions specified in clause (d) of this paragraph.

(f) Any partner or his legal representative shall have the right to enforce the contributions specified in clause (d) of this paragraph, to the extent of the amount which he has paid in excess of his share of the liability.

(g) The individual property of a deceased partner shall be liable for the contributions specified in clause (d) of this paragraph.

(h) When partnership property and the individual properties of the partners are in the possession of a court for distribution, partnership creditors shall have priority on partnership property and separate creditors on individual property, saving the rights of lien or secured creditors as heretofore.

(i) Where a partner has become bankrupt or his estate is insolvent the claims against his separate property shall rank in the following order:

(I) Those owing to separate creditors,

(II) Those owing to partnership creditors,

(III) Those owing to partners by way of contribution.

**Sec. 41.—Liability of Persons Continuing the Business in Certain Cases.** (1) When any new partner is admitted into an existing partnership, or when any partner retires and assigns (or the representative of the deceased partner assigns) his rights in partnership property to two or more of the partners, or to one or more of the partners and one or more third persons, if the business is continued without liquidation of the partnership affairs, creditors of the first or dissolved partnership are also creditors of the partnership so continuing the business.

(2) When all but one partner retire and assign (or the representative of a deceased partner assigns) their rights in partnership property to the remaining partner, who continues the business without liquidation of partnership affairs, either alone or with others, creditors of the dissolved partnership are also creditors of the person or partnership so continuing the business.

(3) When any partner retires or dies and the business of the dissolved partnership is continued as set forth in paragraphs (1) and (2) of this section, with the consent of the retired partners or the representative of the deceased partner, but without any assignment of his right in partnership property, rights of creditors of the dissolved partnership and of the creditors of the person or partnership continuing the business shall be as if such assignment had been made.

(4) When all the partners or their representatives assign their rights in partnership property to one or more third persons who promise to pay the debts and who continue the business of the dissolved partnership, creditors of the dissolved partnership are also creditors of the person or partnership continuing the business.

(5) When any partner wrongfully causes a dissolution and the remaining partners continue the business under the provisions of section 38 (2b), either alone or with others, and without liquidation of the partnership affairs, creditors of the dissolved partnership are also creditors of the person or partnership continuing the business.

(6) When a partner is expelled and the remaining partners continue the business either alone or with others, without liquidation of the partnership affairs, creditors of the dissolved partnership are also creditors of the person or partnership continuing the business.

(7) The liability of a third person becoming a partner in the partnership continuing the business, under this section to the creditors of the dissolved partnership shall be satisfied out of partnership property only.

(8) When the business of a partnership after dissolution is continued under any conditions set forth in this section the creditors of the dissolved partnership as against the separate creditors of the retiring or deceased partner or the representative of the deceased partner, have a prior right to any claim of the retired partner or the representative of the deceased partner against the person or partnership continuing the business, on account of the retired or deceased partner's interest in the dissolved partnership or on account of any consideration promised for such interest or for his right in partnership property.

(9) Nothing in this section shall be held to modify any right of creditors to set aside any assignment on the ground of fraud.

(10) The use by the person or partnership continuing the business of the partnership name, or the name of a deceased partner as part thereof, shall not of itself make the individual property of the deceased partner liable for any debts contracted by such person or partnership.

**Sec. 42.—Rights of Retiring or Estate of Deceased Partner When the Business is Continued.** When any partner retires or dies, and the business is continued under any of the conditions set forth in section 41 (1, 2, 3, 5, 6), or section 38 (2b), without any settlement of accounts as between him or his estate and the person or partnership continuing the business, unless otherwise agreed, he or his legal representative as against such persons or partnership may have the value of his interest at the date of dissolution ascertained, and shall receive as an ordinary creditor an amount equal to the value of his interest in the dissolved partnership with interest, or, at his option or at the option of his legal representative, in lieu of interest, the profits attributable to the use of his right in the property of the dissolved partnership; provided that the creditors of the dissolved partnership as against the separate creditors, or the representative of the retired or deceased partner, shall have priority on any claim arising under this section, as provided by section 41 (8) of this act.

**Sec. 43.—Accrual of Actions.** The right to an account of his interest shall accrue to any partner, or his legal representative, as against the winding up partners or the surviving partners or the person or partnership continuing the business, at the date of dissolution, in the absence of any agreement to the contrary.

## PART VII. MISCELLANEOUS PROVISIONS

**Sec. 44.—When Act Takes Effect.** This act shall take effect on the ..... day of ..... one thousand nine hundred and .....

**Sec. 45.—Legislation Repealed.** All acts or parts of acts inconsistent with this act are hereby repealed





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